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NO.

SUPREME COURT, U.S.
FILED
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In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ABERCROMBIE & FITCH STORES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). "Religion" includes "all aspects of religious observance and practice" unless "an employer demonstrates that he is unable to reasonably accommodate" a religious observance or practice "without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j).

The question presented is whether an employer can be liable under Title VII for refusing to hire an applicant or discharging an employee based on a "religious observance and practice" only if the employer has actual knowledge that a religious accommodation was required and the employer's actual knowledge resulted from direct, explicit notice from the applicant or employee.

PARTIES TO THE PROCEEDING

Petitioner, the Equal Employment Opportunity Commission, was the plaintiff in the district court and the appellee in the court of appeals.

Respondent Abercrombie & Fitch Stores, Inc., d/b/a Abercrombie Kids, was the defendant in the district court and the appellant in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-91a) is reported at 731 F.3d 1106. The opinion and order of the district court (App., *infra*, 92a-120a) is reported at 798 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 2013. A petition for rehearing was denied on February 26, 2014 (App., *infra*, 121a-123a). On May 19, 2014, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to

and including June 26, 2014. On June 17, 2014, Justice Sotomayor further extended the time to July 25, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced in the appendix to this petition. App., *infra*, 126a-137a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer * * * to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's * * * religion." 42 U.S.C. 2000e-2(a)(1). "Religion" is defined to include those "aspects of religious observance and practice" that an employer is able to "reasonably accommodate * * * without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). As a result, an employer has an obligation "to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. 1605.2(b)(1).

2. a. Respondent operates clothing stores under brand names including Abercrombie & Fitch, Abercrombie Kids, and Hollister. The company refers to its sales employees as "Model[s]" and requires them to comply with a "Look Policy." The Look Policy is in-

tended to showcase respondent's brand, which "exemplifies a classic East Coast collegiate style of clothing." App., *infra*, 2a-3a (internal quotation marks omitted). The policy contains rules for clothing, jewelry, facial hair, and footwear; as relevant here, it prohibits employees from wearing black clothing and "caps." *Id.* at 3a. The policy does not define the term "cap," but the district manager covering the store at issue here interpreted the policy to prohibit headscarves. *Ibid.*; *id.* at 9a.

Respondent has policies that govern its hiring process as well. Interviewers evaluate applicants using the company's "official interview guide," which requires interviewers to consider the applicant's "appearance & sense of style," whether the applicant is "outgoing & promotes diversity," and whether the applicant has "sophistication & aspiration." Applicants are rated on a three-point scale in each category. An applicant who receives a score in "appearance" of less than two, or a total score of five or less, is not recommended for hiring. App., *infra*, 8a.

b. Samantha Elauf, who identifies as a Muslim, applied for a "model" position at an Abercrombie Kids store operated by respondent in the Woodland Hills Mall in Tulsa, Oklahoma. Elauf, who was 17 years old at the time she applied to work in the store, has worn a headscarf (or hijab) since she was 13 years old and testified that she does so for religious reasons. Prior to her interview, Elauf asked a friend who worked at the store, Farisa Sepahvand, whether she would be allowed to wear a headscarf if she worked there. App., *infra*, 5a. Sepahvand raised the issue with Kalen McJilton, an assistant manager at the store. McJilton

noted that he had previously worked at a store operated by respondent with an employee who wore a white yarmulke, and told Sepahvand that he did not see any problem with Elauf's wearing a headscarf, "especially if she didn't wear a headscarf that was black." Sepahvand then told Elauf that she would not be able to wear a black headscarf. Elauf seemed agreeable to that restriction. *Id.* at 6a.

Elauf was interviewed for a "model" position at the Abercrombie Kids store by Heather Cooke, an assistant store manager. Elauf wore a black headscarf to the interview. Cooke had seen Elauf wearing a headscarf on other occasions as well. Cooke later explained that though she "did not know" Elauf's religion, she "assumed that she was Muslim" and "figured that was the religious reason why she wore her head scarf." App., *infra*, 7a. During the interview, Cooke described some of respondent's dress requirements, but did not state that any company policy would bar Elauf from wearing a headscarf. Indeed, neither Elauf nor Cooke raised the topic of Elauf's headscarf at all during the interview. *Id.* at 7a-8a.

Cooke considered Elauf a good candidate for a "model" position, but was unsure whether Elauf's headscarf was permitted under the Look Policy. She initially gave Elauf two out of three points on each of the three prescribed criteria—"appearance & sense of style," "outgoing & promotes diversity," and "sophistication & aspiration." This score amounted to an assessment that Elauf "meets expectations" and should be hired. App., *infra*, 8a. Because of her uncertainty about the headscarf, however, Cooke consulted with district manager Randall Johnson before extending a

job offer. *Id.* at 8a-9a. Cooke later explained in a deposition that when she sought guidance about hiring Elauf, she told Johnson she believed Elauf was a Muslim who wore a headscarf for religious reasons.[1] *Ibid.* According to Cooke, Johnson told her that Elauf should not be hired because even if Elauf wore the headscarf for religious reasons, it was not permitted under respondent's Look Policy. *Id.* at 9a, 100a-101a. Johnson told Cooke to change Elauf's "appearance" score from two to one, which would result in her not being hired. *Id.* at 9a. Cooke did so, filling out a new form and throwing away the original interview sheet. *Ibid.* Elauf later learned from Sepahvand that she had not been hired because of her headscarf. *Ibid.*

The U.S. Equal Employment Opportunity Commission (EEOC) filed suit against respondent, alleging that the company had violated Title VII by "refus[ing] to hire Ms. Elauf because she wears a hijab" and "fail[ing] to accommodate her religious beliefs by making an exception to the Look Policy." App., *infra*, 9a. Both parties moved for summary judgment. *Id.* at 10a.

3. The district court granted summary judgment to EEOC. App., *infra*, 92a-120a.

The district court approached the case using the burden-shifting method that courts of appeals have employed in assessing religious accommodation claims at the summary judgment stage. Under that approach, modeled on the framework in *McDonnell-*

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[1] In his deposition, Johnson denied that he had been advised that Elauf wore a headscarf for religious reasons. Pet. App. 9a. Because the court of appeals ordered summary judgment in favor of respondent, all factual disputes must be resolved in favor of EEOC. See *Crawford* v. *Metropolitan Gov't*, 555 U.S. 271, 274 n.1 (2009).

Douglas Corp. v. *Green*, 411 U.S. 792 (1973), a plaintiff alleging a failure to hire must make a prima facie showing that (1) the applicant had a bona fide religious belief that conflicts with an employment requirement; (2) she informed the employer of this belief; and (3) she was not hired for failing to comply with the employment requirement. App., *infra*, 108a-109a (citing *Thomas* v. *National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000)). If the plaintiff makes that showing, the burden shifts to the defendant to rebut one or more elements of the plaintiff's case; to show that it offered a reasonable accommodation of religious practice; or to show that it was unable to accommodate the employee's or applicant's religious needs without undue hardship. *Id.* at 109a (citing *Thomas*, 225 F.3d at 1156).

The district court found that EEOC had established all the elements of a prima facie case and that respondent had not rebutted them. The court observed that the case presented a dispute regarding whether an employee or applicant was required to provide explicit verbal notice of the need for an accommodation in order for an employer to have adequate notice for the purposes of Title VII. App., *infra*, 115a. The district court rejected this explicit-notice rule, adopting instead the position of EEOC and other courts that "the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Ibid.* (citing *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied,

516 U.S. 1158 (1996); *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993); *Hellinger* v. *Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361 (S.D. Fla. 1999)).

The district court found this rule better served the objectives of Title VII than a rule requiring explicit, direct notice. A rule requiring an employer to have enough information to be made aware of a conflict is sufficient to "prevent ambush of an unwitting employer." App., *infra*, 117a. Such a rule also serves Title VII's objective of encouraging an interactive process in which employers and employees strive for mutually acceptable accommodations. See *id.* at 116a-117a (discussing *Thomas*, 225 F.3d at 1155; *Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1171-1172 (10th Cir. 1999)). Under a rule requiring explicit and direct notice from an employee, however, no interactive process would occur in cases in which only the employer is aware of a potential conflict, because job applicants cannot be expected to request an accommodation when they are unaware that a conflict exists. *Id.* at 118a n.11. Here, "there could be no bilateral, interactive process of accommodation because, although [respondent] was on notice that Elauf wore a head scarf for religious reasons, it denied Elauf's application for employment without informing her she was not being hired or telling her why." *Ibid.*

Applying its construction of the notice requirement to Elauf's situation, the district court concluded that respondent had received adequate notice of a religious conflict requiring accommodation because it was "undisputed" that Elauf wore her headscarf at the interview with Cooke, and because Cooke "knew [Elauf] wore the head scarf based on her religious belief."

App., *infra*, 117a. The court also concluded that EEOC had shown that Elauf wore a headscarf as part of her Muslim faith and that respondent declined to hire Elauf because her headscarf conflicted with its Look Policy. *Id.* at 109a-115a. The court found that respondent had not rebutted any of these showings, and that respondent had not shown that granting Elauf a religious accommodation would have resulted in "undue hardship." *Id.* at 120a. Accordingly, the court ordered summary judgment in favor of EEOC as to liability. *Ibid.* After a trial limited to damages, a jury awarded $20,000 in compensation. *Id.* at 12a.

4. a. The court of appeals reversed, ordering summary judgment in favor of respondent. App., *infra*, 1a-91a. The court held that respondent had not received adequate notice of the need for a religious accommodation because only explicit, verbal notice of a conflict directly from an applicant or employee could suffice. *Id.* at 28a. As the court saw it, "a plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule." *Ibid.*; see *id.* at 46a. The court expressly rejected EEOC's contrary position that Title VII is satisfied by notice "from an affirmative statement by the individual, *or some other source*." *Id.* at 30a.

The court of appeals "recognize[d] that some courts have taken a different path on this question" but stated that the court was "confident" that it was correct to require explicit and direct notice from the employee or

applicant. App., *infra*, 46a. The court found support in its own prior cases stating that a plaintiff must establish that an employee "informed his or her employer" of the religious belief requiring accommodation. *Id.* at 30a (quoting *Thomas*, 225 F.3d at 1155); see *id.* at 32a-33a.

The court further concluded that its approach appropriately apportioned burdens under Title VII because important facts about the religious beliefs of an applicant or employee are typically known only to the applicant or employee. App., *infra*, 46a. In particular, only an applicant or employee would typically know if particular practices reflected religious faith or simply personal preferences or culture. *Id.* at 46a-50a. Similarly, the court reasoned, only an applicant or employee would typically know whether the belief underlying a religious practice was inflexible, which the court understood to be a requirement in order for a practice to merit accommodation under Title VII. *Id.* at 52a-53a. In addition, the court found its rule to be most compatible with EEOC's practice of discouraging employers from inquiring as to an applicant's religious beliefs as part of the hiring process. *Id.* at 53a-55a.

The court of appeals found its conclusion was also supported by EEOC policy materials. App., *infra*, 55a. Those describe an employer as having an obligation to reasonably accommodate religious practices "[a]fter an employee or prospective employee notifies the employer * * * of his or her need for a religious accommodation," 29 C.F.R. 1605.2(c)(1), which the court took to imply that an employer has no obligation unless the employee has given explicit notice. App., *infra*, 55a-56a. The court stated that agency manuals

reinforced that conclusion, by explaining that an applicant or employee "must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work" and "cannot assume that the employer will already know or understand it." *Id.* at 56a.

Applying its rule, the court of appeals concluded that respondent was entitled to summary judgment because respondent had not received notice of a conflict through Elauf's verbal statements, and because any notice that respondent received was insufficiently explicit. "[T]here is no genuine dispute of material fact," the court wrote, "that Ms. Elauf never informed [respondent] before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and [respondent's] clothing policy." App., *infra*, 28a.

The court of appeals added that even if Title VII permitted notice to come from a source other than a job applicant or employee herself, the notice respondent received would fall short, because Title VII requires "an employer's particularized, *actual* knowledge of the key facts that trigger its duty to accommodate." Pet. App. 34a; see also *id.* at 39a-40a. The court concluded that constructive knowledge is categorically insufficient to meet this standard, explaining that liability would not attach because an "employer should have guessed, surmised, or figured out from the surrounding circumstances, that the practice was based upon [an applicant's or employee's] religion and that the plaintiff needed an accommodation for it." *Id.* at 39a; see also *id.* at 42a n.9.

The court of appeals also found insufficient an employer's correct inference that a conflict existed. It was not relevant, the court concluded, that Cooke had correctly "assumed that Ms. Elauf wore her hijab for religious reasons and felt religiously obliged to [do] so," App., *infra*, 40a (emphasis omitted), because "a correct assumption does not equal actual knowledge," *id.* at 42a n.9. The court of appeals added that in its view, because respondent's employees lacked "particularized, actual knowledge" of Elauf's beliefs, *id.* at 40a, EEOC would not have prevailed even in those circuits that do not have a requirement of explicit and direct notice, see *id.* at 36a-39a.

b. Judge Ebel concurred in part and dissented in part. App., *infra*, 73a-91a. He dissented from the court's construction of the notice requirement under Title VII, arguing that the court's holding was illogical, *id.* at 74a-81a, and split from the approaches of other courts of appeals, *id.* at 84a-88a.

Judge Ebel explained that an inflexible notice requirement undermines Title VII in cases where an employer is aware of a conflict but an employee is not. In this case, he noted, "the reason Elauf never informed" respondent of the conflict between her religious practice and respondent's Look Policy was that "Elauf did not know that there was a conflict." App., *infra*, 76a. In contrast, respondent "did know there might be a conflict, because it knew that Elauf wore a headscarf, assumed she was Muslim and that she wore the headscarf for religious reasons, and knew its Look Policy * * * prohibited its sales models from donning headwear." *Ibid.* Judge Ebel explained that permitting an employer to refrain from hiring an applicant

based on what the employer understood to be a religious practice was inconsistent with Title VII, because it enabled respondent "to avoid any interactive dialogue with Elauf about whether [respondent] could reasonably accommodate Elauf's religious practice." *Ibid.*

Judge Ebel noted that the majority "creat[ed] a conflict among the circuits" by disagreeing with the courts that "permit a plaintiff to establish a prima facie failure-to-accommodate claim by establishing that the employer knew, by any means, of a conflict between the plaintiff's religious practices and the employer's work rules." App., *infra*, 87a; see *id.* at 85a-86a & n.7 (discussing *Dixon*, 627 F.3d at 855-856; *Brown*, 61 F.3d at 652-653; *Heller*, 8 F.3d at 1436-1437; *Hellinger*, 67 F. Supp. 2d at 1361-1363). Other circuits, he explained, "conclude that '[a]n employer need have "only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements."'" *Id.* at 86a (quoting *Brown*, 61 F.3d at 654 (brackets in original); *Heller*, 8 F.3d at 1439). Judge Ebel stated that he would adopt those courts' approach, at least in cases in which an employer has superior knowledge of a conflict between an employee's religious practice and company policies. *Id.* at 86a-87a.

While Judge Ebel concluded that the facts alleged by EEOC would, if true, support Title VII liability, he concurred with the portion of the majority opinion vacating the grant of summary judgment to EEOC, because he concluded that there were factual disputes

between the parties relevant to respondent's liability. App., *infra*, 90a-91a & n.12.

5. By an evenly divided vote among active judges, the court of appeals denied rehearing en banc. App., *infra*, 121a-133a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit erred in holding that employers cannot be liable for failure to provide religious accommodations under Title VII unless they have received explicit notice giving rise to "particularized, actual knowledge" of the conflict directly from the applicant or employee. Its decision conflicts with the decisions of at least four other courts of appeals, and threatens broad adverse consequences, particularly in situations involving applications for employment, where applicants may never learn that their religious practices conflict with job requirements and therefore require accommodation. This Court's intervention is warranted.

A. The Tenth Circuit Erred In Holding That Title VII Protects Only Employees Who Directly Provide Explicit Notice Of The Need For A Religious Accommodation

Title VII makes it unlawful for any employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). "Religion" is defined to include "all aspects of religious observance and practice, as well as belief" unless an employer demonstrates that accommodating the religious practice would be an undue

hardship. 42 U.S.C. 2000e(j). By their plain terms, these provisions together make it unlawful for an employer to discriminate against any job applicant based on the applicant's religious practice, absent a showing of undue hardship. The holding of the court of appeals is incompatible with this text because it permits employers to deliberately "fail or refuse to hire" applicants, 42 U.S.C. 2000e-2(a)(1), based on what the employer understands correctly to be "aspects of religious observance and practice," 42 U.S.C. 2000e(j). The statute's text provides no foothold for the additional requirement that an employer's understanding that a practice reflects religious beliefs must come from explicit statements of the applicant herself.

The court of appeals' carve-out from Title VII protections is likewise incompatible with the statute's objectives. Title VII accommodates both religious observance and business imperatives by requiring "bilateral cooperation" to achieve "an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business." *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 69 (1986) (citation omitted); see also *ibid.* (discussing legislative history supporting this view). The court of appeals' rule undermines Title VII's framework. Employers who conclude that an applicant may have a religious conflict based on information other than direct, explicit notice from the applicant have no incentive to begin a process of cooperative "reconciliation of the needs," *ibid.*, with the additional obligations that process may entail. Employers may simply find it easier not to hire the observant applicant—a result that Title VII sought to avoid.

The court of appeals appeared to conclude that its result would not undermine Title VII's protections for religious practices because applicants and employees inevitably have superior knowledge of their religious beliefs and are therefore best positioned to raise any conflict. See App., *infra*, 46a-53a. But knowledge of the need for an accommodation requires an understanding not simply of an applicant's or employee's religious beliefs but also of company policies—an area where an employer's knowledge is generally superior. Here, for instance, Elauf never requested an accommodation because she was unaware that her headscarf would conflict with company policy. See *id.* at 75a-76a. The court of appeals' holding thus permits employers to take adverse employment actions based on what they correctly understand to be religious practices in cases in which applicants or employees simply lack the knowledge necessary to request an accommodation.

The court of appeals' decision will lead to irrational results in other cases as well, by foreclosing Title VII's protections when the statements of employees— who may be unsophisticated or may simply be unaware of the magic words the Tenth Circuit now requires— would be adequate to put any reasonable person on notice of the need for an accommodation, but fall short of the direct and explicit standard that the court of appeals has imposed. See, *e.g.*, *Heller* v. *EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993) (Jewish employee requesting time off for wife's religious conversion ceremony but not explicitly stating that attendance was a religious obligation); *Dixon* v. *Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010) (Christian employees refusing to comply with policy barring display of

religious art but not stating that their refusal reflects perceived religious obligations and requires accommodation).

The court of appeals' additional concerns do not justify the gap that the court would create in Title VII protections. The court suggested that an explicit, direct notice requirement is required because EEOC discourages employers from inquiring as to job applicants' religious beliefs in the first instance or from engaging in religious stereotyping, noting that either conduct could suggest that an employer was discriminating in employment decisions on the basis of religion. App., *infra*, 55a-56a. But after an employer has in fact received sufficient information about an applicant's or employee's beliefs to be on notice of a religious conflict, or (as here) where the employer assumes correctly the existence of such a conflict, EEOC does not discourage employers from making inquiries necessary to confirm the need for an accommodation. See *EEOC Compliance Manual, Section 12: Religious Discrimination* 12-I-A-3, 12-IV-A-2, Examples 30 and 31 (2008) (*Compliance Manual*). And in any case, employers can obtain the needed information simply by advising an applicant of a work rule and inquiring as to whether (and why) the applicant would have difficulty complying. See generally EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace*, http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited July 24, 2014); *Compliance Manual* 12-IV(A). Accordingly, the court of appeals' concern about the prospect of routine inquiry into religious faith does not justify its holding.

B. The Tenth Circuit's Decision Creates A Split With Four Other Courts of Appeals

As both the majority and dissent recognized, the court of appeals' decision creates a conflict among the circuits regarding the notice that an employer must have in order to be obligated to consider an accommodation for a religious practice. App., *infra*, 46a; see also *id.* at 87a (Ebel, J., concurring in part and dissenting in part). The court of appeals' holding that an employer is free to take action against an employee or applicant based on the person's religious practices, unless the person has directly "informed the employer that the [employee or applicant] adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice," *id.* at 28a, squarely conflicts with the approaches of four circuits that have rejected an explicit notice rule. Those courts simply require that an employer have "enough information about an employee's religious needs" from any source "to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Brown* v. *Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc), cert. denied, 516 U.S. 1158 (1996); *Heller*, 8 F.3d at 1439; *Dixon*, 627 F.3d at 856; see also *Adeyeye* v. *Heartland Sweeteners, LLC*, 721 F.3d 444, 450 (7th Cir. 2013) (applying same principle).

1. The Seventh, Eighth, Ninth, and Eleventh Circuits have each expressly rejected the explicit notice requirement adopted by the court of appeals in this case. In *Heller*, for example, a Jewish employee was fired for missing work to attend his wife's conversion ceremony. 8 F.3d at 1439. While the employee had

asked to attend the ceremony, the employer argued that "because Heller never explained the nature of the ceremony to [the employer], he did not give notice of his conflict." *Ibid.* The Ninth Circuit disagreed that any such explanation was required, explaining that "[a] sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements." *Ibid.*

Sitting en banc, the Eighth Circuit adopted the same formulation. See *Brown*, 61 F.3d at 654. In *Brown*, an employee was reprimanded for engaging in religious activities at work, such as referring to Bible passages and using office space for group prayers. He was fired based in part on the reprimand. The court of appeals rejected the employer's defense that it had not received adequate notice of a conflict requiring accommodation, concluding that Title VII required that "[a]n employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *Ibid.* (quoting *Heller*, 8 F.3d at 1439). The court rejected an explicit-notice alternative. *Ibid.* ("reject[ing] the defendants' argument that because Mr. Brown never explicitly asked for accommodation for his religious activities, he may not claim the protections of Title VII"). Further, the court found notice established because the employer's conduct demonstrated that it was aware of a religious conflict, explaining that the employer's having issued a reprimand that "related directly to religious activities

by Mr. Brown" established that the employer was "well aware of the potential for conflict between [its] expectations and Mr. Brown's religious activities." *Ibid.*

The Eleventh Circuit similarly rejected an express notice requirement and found notice established by actions that signaled an employer's awareness of a religious conflict. In *Dixon*, a couple employed by an apartment complex was fired after a confrontation surrounding their display of religious art. 627 F.3d at 853. The court of appeals rejected the explicit-notice defense raised by the employer, concluding that it was not fatal to the couple's Title VII claims that they "never expressly told [their supervisor] that they did not want to take down their artwork because they opposed efforts to remove God from public places." *Id.* at 856. The court quoted approvingly the standard in *Brown* and *Heller* that "[a]n employer need have 'only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *Ibid.* And, like the Eighth Circuit, it found this notice requirement satisfied by conduct showing that the employer had in fact received enough information to be aware of a conflict. In particular, the court concluded that if a jury accepted that a supervisor told one of the plaintiffs "he was 'too religious' when she fired him," the jury could find the notice requirement satisfied because the jury "could reasonably infer that [the supervisor] connected the [plaintiffs'] failure to remove the artwork with their religious beliefs." *Id.* at 855-856.

Most recently, the Seventh Circuit rejected an explicit notice requirement in *Adeyeye*, *supra*. The employee in that case had been fired because he missed work to attend his father's funeral ceremonies in Nigeria. In requesting a leave of absence, the employee had referred to the ceremony he would attend as a "funeral rite," mentioned animal sacrifice, and stated that there was a spiritual need for his presence, but he had made no direct references to religion. 721 F.3d at 450-451. The district court held on summary judgment that the plaintiff had not provided the employer with sufficient "notice of the religious nature of the request." *Id.* at 447. The Seventh Circuit reversed, holding that "Title VII has not been interpreted to require adherence to a rigid script to satisfy the notice requirement." *Id.* at 450. The court stated that an employee was required to give only "fair notice" of the need for an accommodation and indicated—like the other courts of appeals—that an employer would be charged with reasonable inferences from the employee's request. *Id.* at 449-450. In particular, the court explained, while an employer was free to seek to clarify an ambiguous request, "an 'employer cannot shield itself from liability by intentionally remaining in the dark'" regarding a person's need for reasonable accommodation. *Id.* at 450 (citation omitted).

2. Under the standards applied by other courts of appeals, respondent would not have been entitled to summary judgment, because viewing the facts in the light most favorable to EEOC, respondent's own actions demonstrated that it had "enough information about [Elauf's] religious needs to permit [it] to understand the existence of a conflict between [her] reli-

gious practice and [its] job requirements." *Brown*, 61 F.3d at 654. The undisputed facts showed that Elauf wore a hijab to her job interview and that the assistant manager who interviewed Elauf had also seen Elauf wearing a headscarf on other occasions. See App., *infra*, 7a. Most critically, the assistant manager explained in a deposition that she did infer from observing this practice that Elauf was a Muslim who wore a headscarf for religious reasons and that she was instructed not to hire Elauf based on her headscarf even if the headscarf reflected a religious practice. *Id.* at 7a-9a (noting that Heather Cooke "assumed that [Elauf] was Muslim"; "figured that was the religious reason why she wore her head scarf"; and told Johnson of Elauf's religious requirements); see also *id.* at 99a-100a. Indeed, the company's decision not to hire Elauf because of her headscarf plainly reflected the understanding that the headscarf was not a fashion choice but a mandatory commitment, such that Elauf would not be able to adhere to respondent's Look Policy if hired. See *id.* at 9a (explaining that supervisor directed that Elauf not be hired because "she wore a headscarf—a clothing item that was inconsistent with the Look Policy").

Other circuits have made clear that this showing that an employer did in fact infer the existence of a religious conflict demonstrates that the employer had "enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practice and the employer's job requirements." See *Brown*, 61 F.3d at 654. Thus, *Dixon* reasoned that a jury could find notice based on evidence that a super-

visor's statements showed the supervisor was "aware of the tension between her order and the [plaintiffs'] religious beliefs." 627 F.3d at 855-856. And *Brown* found notice established because an employer's reprimand concerning religious activities showed "that the defendants were well aware of the potential for conflict between their expectations and [the plaintiff's] religious activities." 61 F.3d at 654.

The court below misunderstands these cases in suggesting that they required "particularized, actual knowledge," see App., *infra*, 36a-40a, beyond that established by an employer's having correctly inferred a religious conflict from an applicant's appearance or behavior, see *id.* at 39a-40a. The "particularized, actual knowledge" requirement that the decision below sets out is nowhere articulated in the opinions of other courts. To the contrary, as noted above, the courts that have found notice based on employers' awareness of a conflict simply relied on evidence—like that present in this case—that the employers believed a conflict existed. See *Dixon*, 627 F.3d at 855-856 (statements when firing plaintiffs); *Brown*, 61 F.3d at 654 (statements in reprimand letter). If anything, the evidence presented in this case is stronger, because in addition to evidence drawn from respondent's treatment of Elauf, the record includes testimony in which the assistant manager who interviewed Elauf directly stated that she believed Elauf had a religious conflict that would require accommodation. See App., *infra*, 8a, 99a-100a.

Nor is the court of appeals correct that *Adeyeye* and *Heller* each required "particularized, actual knowledge." App., *infra*, 36a. Far from adopting such

a standard, each of those decisions suggested that an employer could be on notice of a conflict even if the employer failed to grasp the need for an accommodation at all, so long as a reasonable person would have understood the conflict. See *Adeyeye*, 721 F.3d at 450 (stating that "[t]he employer * * * must be alert enough to grasp that the request [for an accommodation] is religious in nature" and that "an 'employer cannot shield itself from liability by intentionally remaining in the dark"); *Heller*, 8 F.3d at 1439 (test based on employer's receiving adequate information to "to *permit* the employer to understand the existence of a conflict") (emphasis added). Because the record below demonstrated that respondent's hiring personnel correctly understood Elauf's religious practice to conflict with its work rules, respondent would not be entitled to summary judgment in other courts.

3. This case is a particularly good vehicle to address the conflict among the courts of appeals because of the unusually clear factual record. Unlike in many cases involving hiring decisions, there is no dispute in this case that the applicant was not hired solely because of a religious practice—that is, there is no question that Elauf was not hired because respondent concluded that her practice of wearing a hijab would make it impossible for her to comply with respondent's Look Policy. The absence of extraneous factual disputes ensures that the Court will be able to reach the legal dispute presented concerning notice under Title VII.

C. This Case Presents A Question Of Exceptional Importance

The standard adopted by the court of appeals will affect Title VII protections in a large number of cases.

The significant—and growing—number of religious discrimination complaints received each year by EEOC indicates that the standards that courts set for religious discrimination claims affect a large number of real-world disputes. See EEOC, *Religion-Based Charges FY 1997-FY 2013*, http://www.eeoc.gov/eeoc/statistics/enforcement/religion.cfm (last visited July 24, 2014) (noting that EEOC received 3721 religious discrimination complaints in most recent fiscal year). And published cases establish that the court of appeals' requirement that a Title VII claimant must have directly "informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice," App., *infra*, 28a, will affect a large number of the accommodation cases that arise, because employees without legal training often make requests that fall short of this standard. See, *e.g.*, *Heller*, 8 F.3d at 1439; *Dixon*, 627 F.3d at 856; *Adeyeye*, 721 F.3d at 450-451.

The court of appeals' ruling will have a particularly significant impact in the frequently arising cases involving job applicants whose religions impose requirements concerning grooming or dress.[2] Employ-

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[2] Among the recent Title VII cases brought by EEOC to challenge employers' failure to accommodate religious practices concerning grooming or attire are *EEOC* v. *Morningside House of Ellicott City, LLC*, No. 11-2766 (D. Md.); *EEOC* v. *Shadescrest Healthcare Ctr.*, No. 14-1253 (N.D. Ala.); *EEOC* v. *Abercrombie & Fitch Stores*, No. 10-3911 (N.D. Cal.); *EEOC* v. *Kaze Japanese Steakhouse*, No. 10-358 (E.D.N.C.); *EEOC* v *LAZ Parking, LLC*, No. 10-1384 (N.D. Ga.); *EEOC* v. *Ivy Hall Assisted Living, LLC*, No. 08-3067 (N.D. Ga.); *EEOC* v. *White Lodging Servs. Corp.*, No. 06-353 (W.D. Ky.); *EEOC* v. *Regency Health Assocs.*, No. 05-2519

ers with dress codes who interview such applicants will often be able to foresee a possible religious conflict based on an applicant's presentation in the interview—just as respondent did here. And, as in this case, such employers will frequently have knowledge superior to that of applicants concerning whether the grooming or attire at issue would conflict with a company policy. By permitting employers to decline to hire applicants in these cases based on what they accurately perceive to be religious practices, without initiating a dialogue or even advising applicants of the conflicting policy, the court of appeals undercuts the protection of religious practices in an important and frequently arising context.

(N.D. Ga.); *EEOC* v. *Autozone, Inc.*, No. 10-11648 (D. Mass.); and *EEOC* v. *Tri County Lexus*, No. 10-4987 (D. N.J.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 2014

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-5110

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS,
DEFENDANT-APPELLANT

Filed: Oct. 1, 2013

OPINION

Before: KELLY, EBEL, and HOLMES, Circuit Judges.

HOLMES, Circuit Judge.

Abercrombie & Fitch ("Abercrombie") appeals from the district court's grant of summary judgment in favor of the Equal Employment Opportunity Commission ("EEOC") and the court's denial of summary judgment in favor of Abercrombie, on the EEOC's claim that Abercrombie failed to provide a reasonable religious accommodation for a prospective employee, Samantha Elauf, in contravention of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse the district court's grant of summary judgment

to the EEOC. Abercrombie is entitled to summary judgment as a matter of law because there is no genuine dispute of material fact that Ms. Elauf never informed Abercrombie prior to its hiring decision that she wore her headscarf or "hijab"[1] for religious reasons and that she needed an accommodation for that practice, due to a conflict between the practice and Abercrombie's clothing policy. Accordingly, we remand the case to the district court with instructions to vacate its judgment and enter judgment in favor of Abercrombie, and for further proceedings consistent with this opinion.

I

A

Abercrombie is a retail clothing company that operates stores across the United States under a variety of brand names, including Abercrombie & Fitch, abercrombie ("Abercrombie Kids"), and Hollister. Abercrombie requires employees in its stores to comply with a "Look Policy."[2] That policy is intended to promote and showcase the Abercrombie brand, which

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[1] A leading scholar of Islam, who was the EEOC's expert in this case, John L. Esposito, Ph.D., has defined a "hijab" as the "veil or head covering worn by Muslim women in public." John L. Esposito, *Islam: The Straight Path* 310 (4th ed. 2011). In their briefing, the parties use the terms "headscarf" and "hijab" interchangeably, and so do we.

[2] Our inquiry is focused on the Look Policy as it was set forth in the Store Associate Handbook (revised Sept. 2006). This was the policy applicable in 2008 when the events relevant here took place. Consequently, we do not consider any changes that Abercrombie may have made to the Look Policy since then.

"exemplifies a classic East Coast collegiate style of clothing." Aplt. Opening Br. at 5. The Look Policy applies to every Abercrombie employee. Under the circumstances of this case, however, our central concern is the policy's application to sales floor employees, whom Abercrombie referred to as "Model[s]." Aplt. App. at 372 (Dep. of Chad Moorefield, taken Mar. 16, 2011). Employees must dress in clothing that is consistent with the kinds of clothing that Abercrombie sells in its stores. Notably, the policy prohibits employees from wearing black clothing and "caps," although the policy does not explicate the meaning of the term "cap." Aplee. Supp. App. at 69 (Abercrombie Store Associate Handbook, dated Sept. 2006). An employee is subject to "disciplinary action up to and including termination" for failure to comply with the Look Policy. *Id.*

Abercrombie contends that its Look Policy is critical to the health and vitality of its "preppy" and "casual" brand. *See* Aplt. Opening Br. at 5 (quoting Aplt. App. at 375; *id.* at 63 (Dep. of Kalen McJilton, taken Jan. 20, 2011)) (internal quotation marks omitted). This is so, Abercrombie maintains, because it does very little advertising through traditional media outlets (e.g., print publications or television); instead, it relies on its in-store experience to promote its products. Consequently, Abercrombie expends a great deal of effort to ensure that its target customers receive a holistically brand-based, sensory experience. *See, e.g.*, Aplt. App. at 70 (Dep. of Deon Riley, taken Mar. 17, 2011) ("Abercrombie has made a name because of the brand. It's a fact that you walk into an environment, and it's not just the smell or the sound,

it's the way the merchandise is set up. It's the lighting. Most of all, it's the stylish clothing. "). The "main part" of a Model's job is to "represent [Abercrombie's] clothing[,] first and foremost." *Id.* at 376. To Abercrombie, a Model who violates the Look Policy by wearing inconsistent clothing "inaccurately represents the brand, causes consumer confusion, fails to perform an essential function of the position, and ultimately damages the brand." Aplt. Opening Br. at 8.

The interviewing process plays an important role in furthering Abercrombie's objective of ensuring that employees adhere to its Look Policy. Managers assess applicants on appearance and style during the interview. They are supposed to inform applicants of various aspects of the job, including the Look Policy. New Models typically receive a copy of the policy in an employee handbook and sign an acknowledgment that they have received it, when they start work.

Abercrombie instructs its store managers not to assume facts about prospective employees in job interviews and, significantly, not to ask applicants about their religion. If a question arises during the interview regarding application of the Look Policy, or if a prospective employee requests a deviation from the policy (for example, based on an inflexible religious practice), the store manager is instructed to contact Abercrombie's corporate human resources department ("HR"), or his or her direct supervisor. HR managers may grant accommodations if doing so would not harm the brand.

B

Samantha Elauf claims to be a practicing Muslim.[3] In mid-2008, Ms. Elauf, then seventeen-years old, applied for a Model position at the Abercrombie Kids store in the Woodland Hills Mall in Tulsa, Oklahoma. She had previously purchased and worn Abercrombie clothes.

Prior to her interview, Ms. Elauf discussed with a friend who worked at Abercrombie's Woodland Hills location, Farisa Sepahvand, whether wearing a hijab to work would be permissible. Ms. Elauf has worn a hijab since she was thirteen and testified that she does so for religious reasons. The Quran—the "sacred scripture" of the Islamic faith, Aplee. Supp. App. at 5 (Dep. of John L. Esposito, taken Feb. 22, 2011)—counsels women to protect their modesty, and some religious scholars "believe that the Qu[]ran does require an hijab" to be worn by Muslim women, "but there are many who disagree with that interpretation," *id.* at 2. As the EEOC's expert, Dr. Esposito, testified, although some Muslim women wear hijabs for religious reasons, those are not the only reasons that Muslim women wear hijabs; for example, some do so for cultural reasons or in order to demonstrate a personal rejection of certain aspects of Western-style dress.[4] Dr. Esposito testified that, in understanding

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[3] The parties dispute whether Ms. Elauf possesses a bona fide, sincerely held religious belief in Islam. This dispute, however, is not material to our resolution of this case; therefore, we need not (and do not) address it.

[4] Relevant to this point, in his scholarly writing, Dr. Esposito observes:

the reasons why people maintain certain styles of dress, "it really is, the question is, what is their motivation." Aplt. App. at 292; *see id.* at 472 (noting, as to why a hijab is worn, "it really depends on the woman").

In responding to Ms. Elauf's inquiry about wearing a headscarf, Ms. Sepahvand testified that she had raised the issue with assistant manager Kalen McJilton, who knew Ms. Elauf from her prior visits to the store. Noting that he had previously worked at Abercrombie with someone who wore a white yarmulke, Mr. McJilton suggested that he did not see any problem with Ms. Elauf wearing a headscarf, "especially if she didn't wear a headscarf that was black." Aplee. Supp. App. at 181 (Dep. of Farisa Sepahvand, taken Mar. 31, 2011) (internal quotation marks omitted). Ms. Sepahvand then communicated to Ms. Elauf that, although a headscarf would be permitted, because of Abercrombie's no-black-clothing policy, she would not

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> The religious situation of American Muslims can be especially difficult for the younger generation. Many have parents, raised in overseas Muslim societies, who *equate cultural practices and norms with the principles of Islam.* Their children face the challenge of both fitting into American societies and retaining their Islamic identity, of *distinguishing between what is mandated by religion and the "foreign" cultural baggage of their parents.*

Esposito, *supra*, at 291 (emphases added); *cf. id.* at 74 ("Yet [Muslims] continue to face issues of identity and faith as a religious minority. As with many other religious and ethnic groups that preceded them, Muslim communities face issues of assimilation or integration, diversity, and pluralism.").

be able to wear a black one. Ms. Elauf seemed agreeable to that restriction.

Ms. Elauf met with assistant manager Heather Cooke to interview for the Model position. Ms. Cooke was already familiar with Ms. Elauf, having observed her in the Abercrombie store chatting with Ms. Sepahvand and working elsewhere in the Woodland Hills Mall. Ms. Cooke had seen Ms. Elauf wearing a headscarf prior to the interview. Ms. Cooke "did not know" Ms. Elauf's religion, but she "assumed that she was Muslim," Aplt. App. at 365 (Dep. of Heather Cooke, taken Jan. 19, 2011), and "figured that was the religious reason why she wore her head scarf," Aplee. Supp. App. at 48. In the interview, Ms. Cooke did not ask Ms. Elauf if she was a Muslim.

Ms. Elauf was familiar with the type of clothing Abercrombie sold and knew that Models were required to wear similar clothing. During the interview, Ms. Elauf wore an Abercrombie-like T-shirt and jeans. She also wore a headscarf (i.e., hijab); it was black. According to Ms. Elauf, Ms. Cooke never mentioned the Look Policy by name but she did describe some of the dress requirements for Abercrombie employees, and informed Ms. Elauf that she would have to wear clothing similar to that sold by Abercrombie and, specifically, that she could not wear heavy makeup or nail polish.

During the course of the interview, Ms. Elauf never informed Ms. Cooke that she was Muslim, never brought up the subject of her headscarf, and never indicated that she wore the headscarf for religious reasons and that she felt obliged to do so, and thus would need an accommodation to address the conflict be-

tween her religious practice and Abercrombie's clothing policy. Indeed, the topic of her headscarf never came up one way or the other. For example, Ms. Cooke did not tell Ms. Elauf that she "wouldn't be able to wear [her headscarf] or anything like that." Aplt. App. at 55 (Dep. of Samantha Elauf, taken Jan. 4, 2011). After offering a description of the dress requirements, Ms. Cooke asked Ms. Elauf at the end of the interview if she had any questions. Ms. Elauf did not ask any.

Ms. Cooke assessed Ms. Elauf's candidacy using Abercrombie's official interview guide. The guide requires the interviewer to consider the applicant's "appearance & sense of style," whether the applicant is "outgoing & promotes diversity," and whether he or she has "sophistication & aspiration." Aplee. Supp. App. at 61 (Model Group Interview Guide, dated June 26, 2008). Each category is assessed on a three-point scale, and an applicant with a score in "appearance" of less than two, or a total combined score of five or less, is not recommended for hire. Ms. Cooke initially scored Ms. Elauf at a two in each category, for a total of six, which is a score that "meets expectations" and amounts to a "recommend[ation]" that Abercrombie hire her. *See id.* at 64.

Although Ms. Cooke believed Ms. Elauf was a good candidate for the job, she was unsure whether it would be a problem for her to wear a headscarf as an Abercrombie Model, and whether the headscarf could be black in color. Ms. Cooke ordinarily did not seek approval from a senior manager in evaluating or hiring new Models, but in this case she did.

Ms. Cooke's direct supervisor was unable to answer her question about Ms. Elauf's headscarf, so Ms. Cooke consulted with Randall Johnson, her district manager. Mr. Johnson said that Ms. Elauf should not be hired because she wore a headscarf—a clothing item that was inconsistent with the Look Policy. Notwithstanding Ms. Cooke's contrary deposition testimony, Mr. Johnson denied being told by Ms. Cooke that Ms. Elauf was a Muslim and that she wore her headscarf for religious reasons.

Ms. Cooke testified that Mr. Johnson told her to change Ms. Elauf's interview score on the appearance section from a two to a one, thereby bringing her overall score down to a five and ensuring that she would not be recommended for hire. With this understanding, Ms. Cooke threw away the original interview sheet and changed Ms. Elauf's score, thus implementing Mr. Johnson's alleged instructions. Ms. Cooke did not extend a job offer to Ms. Elauf. A few days after the interview, Ms. Elauf learned from Ms. Sepahvand that she had not been hired because of her headscarf.

C

The EEOC filed the instant action against Abercrombie on September 17, 2009, alleging violations of Title VII, on the grounds that Abercrombie "refused to hire Ms. Elauf because she wears a hijab" and "failed to accommodate her religious beliefs by making an exception to the Look Policy." Dist. Ct. Doc. No. 2, at 2 (EEOC Compl., filed Sept. 17, 2009). It sought injunctive relief, back pay, and damages.

Abercrombie disputed the EEOC's allegations and argued that Ms. Elauf failed to inform it of a conflict

between the Look Policy and her religious practices. It further argued that the proposed accommodation—allowing Ms. Elauf to wear the headscarf— would have imposed an undue hardship on the company. Furthermore, it challenged Ms. Elauf's assertion that she possessed a bona fide, sincerely held religious belief, forming the basis for her purported conflict with the Look Policy.

The parties filed cross-motions for summary judgment on issues concerning liability. In addressing the motions and the religion-accommodation claim, the district court applied the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under that framework, the court concluded that the EEOC had established a prima facie case through evidence that Ms. Elauf had a bona fide, sincerely held religious belief and a related practice that conflicts with the Look Policy. Specifically, the court found that Ms. Elauf wore her "head scarf based on her belief that the Quran requires her to do so" and "this belief conflicts with Abercrombie's prohibition against headwear." Aplt. App. at 575 (Op. & Order, filed July 13, 2011). Further, it reasoned that "Abercrombie had notice [that] she wore a head scarf because of her religious belief[,] and that it refused to hire her because the head scarf conflicted with its Look Policy." *Id.*

The district court rejected Abercrombie's argument that the notice element of the EEOC's prima facie case was not satisfied because Ms. Elauf did not personally inform Abercrombie that she wore her hijab for religious reasons and would need an accommodation for it,

because she was obliged to do so. The court reasoned that, while the Tenth Circuit had not directly addressed this issue, "[c]ourts in other circuits have held that the notice requirement is met when an employer has enough information to make it aware [that] there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." *Id.* at 580. It further stated that, "faced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice [that] an accommodation is needed[,] the Tenth Circuit would likely opt for the latter choice." *Id.* at 581 (footnote omitted).

Applying its formulation of the notice requirement, the district court observed that "it is undisputed that Elauf wore her head scarf at the interview with assistant store manager Heather Cooke, and Cooke *knew* she wore the head scarf based on her religious belief." *Id.* (emphasis added). It added that, while a fact question may yet exist as to whether Ms. Cooke told Mr. Johnson that Ms. Elauf wore her headscarf because of her religion, that question was immaterial "because the knowledge of Cooke—who had responsibility for hiring decisions at the Abercrombie Kids store—is attributable to Abercrombie." *Id.* at 581 n.11. The district court stated that "there could be no bilateral, interactive process of accommodation because, although Abercrombie was on notice that Elauf wore a head scarf for religious reasons, it denied [her] application for employment without informing her [that] she was not being hired or telling her why." *Id.* at 582 n.12.

The district court also rejected Abercrombie's contention that, even if the EEOC had established its prima facie case, Abercrombie had demonstrated that it would suffer undue hardship. The court observed that, despite speculative testimony to the contrary, Abercrombie had provided no "studies or specific examples" to support its opinion that granting Ms. Elauf an exception "would negatively impact the brand, sales[,] and compliance [with the Look Policy]." *Id.* at 582. In that vein, it emphasized that Abercrombie had made numerous exceptions to the Look Policy over the past ten or so years—most significantly, "[e]ight or nine head scarf exceptions." *Id.* at 583.

The parties went to trial on damages. The jury awarded the EEOC $20,000 in compensatory damages. The EEOC's request for prospective injunctive relief was denied. This timely appeal followed.

II

In summary, we conclude that the district court erred in denying summary judgment to Abercrombie.[5]

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[5] While "the denial of a summary-judgment motion is ordinarily not an appealable order [in itself], it can be reviewed when 'it is coupled with a *grant* of summary judgment to the opposing party.'" *Quik Payday, Inc. v. Stork*, 549 F.3d 1302, 1306 n.1 (10th Cir. 2008) (emphasis added) (quoting *Yaffe Cos. v. Great Am. Ins. Co.*, 499 F.3d 1182, 1184 (10th Cir. 2007)); *see Thom v. Am. Standard, Inc.*, 666 F.3d 968, 972-73 (6th Cir. 2012). Abercrombie moved for summary judgment before the district court on the same grounds as it raises now on appeal and the parties engaged in an exhaustive round of briefing before the district court. The record is fully developed and the issues are amenable to dispositive resolution. *See, e.g., Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 465 (7th Cir. 1997) ("The reason that appellate courts, when reversing a grant of

More specifically, we hold that, under the governing substantive law, Abercrombie is entitled to summary judgement because there is no genuine dispute of material fact regarding this key point: Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing a hijab was based on her religious beliefs and (because she felt religiously obliged to wear it) that she would need an accommodation for the practice, because of a conflict between it and Abercrombie's clothing policy. Furthermore, it follows ineluctably from the logic and reasoning of our decision that, in granting partial summary judgment to the EEOC, the district court erred.

A

Our review of a district court's summary judgment ruling is de novo; we "apply[] the same standard as the district court." *Helm v. Kansas*, 656 F.3d 1277, 1284 (10th Cir. 2011). "[S]ummary judgment is appropriate 'if the movant shows that there is no genuine dispute

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summary judgment, typically do not direct the district court to enter summary judgment in favor of the appellant is because a genuine issue of material fact remains. But, in instances in which the facts and law establish that the appellant is entitled to judgment as a matter of law, we are free to direct the district court to enter judgment in appellant's favor." (quoting *Swaback v. Am. Info. Techs. Corp.*, 103 F.3d 535, 544 (7th Cir. 1996)) (internal quotation marks omitted)); *see also McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993) ("Where we reverse a summary judgment order in favor of one party, we will review the denial of the other party's cross-motion for summary judgment under the same standards applied by the district court so long as it is clear that the party opposing the cross-motion had an opportunity to dispute the material facts.").

as to any material fact and the movant is entitled to judgment as a matter of law.'" *Morris v. City of Colo. Springs*, 666 F.3d 654, 660 (10th Cir. 2012) (quoting Fed. R. Civ. P. 56(a)). In assessing a motion for summary judgment, "[w]e view the facts, and all reasonable inferences those facts support, in the light most favorable to the nonmoving party." *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 947 (10th Cir. 2011).

Succinctly put, we must "examine the record to determine whether any genuine issue of material fact [i]s in dispute; if not, we determine [the correct application of the] substantive law , and in so doing we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Oldenkamp v. United Am. Ins. Co.*, 619 F.3d 1243, 1246 (10th Cir. 2010) (quoting *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998)) (internal quotation marks omitted); *see Morris*, 666 F.3d at 660; *City of Herriman v. Bell*, 590 F.3d 1176, 1180-81 (10th Cir. 2010). As pertinent here, we construe the facts in the light most favorable to the EEOC.

B

1

To properly assess Ms. Elauf's Title VII religion-accommodation claim, we must first understand the meaning that the term "religion" takes on in the Title VII context. Under Title VII it is "an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's religion."

Thomas v. Nat'l Ass'n of Letter Carriers, 225 F.3d 1149, 1154 (10th Cir. 2000) (second omission in original) (quoting 42 U.S.C. § 2000e-2(a)(1)) (internal quotation marks omitted). "The term 'religion' includes all aspects of religious observance and practice, as well as belief. " 42 U.S.C. § 2000e(j).

As the EEOC has recognized, "[r]eligion is very broadly defined under Title VII." EEOC Compliance Manual § 12-I(A) (emphasis omitted), *available at* http://www.eeoc.gov/policy/docs/religion.html; *see also Bushouse v. Local Union 2209, United Auto., Aerospace, & Agric. Implement Workers*, 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) (noting that Title VII has a "broad definition of 'religious belief'"). "Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others." EEOC Compliance Manual § 12-I(A)(1). However, while recognizing a broad concept of religion, the EEOC acknowledges that the substantive content of religious beliefs is distinctive:

> Religious beliefs include theistic beliefs as well as non-theistic moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. Although courts generally resolve doubts about particular beliefs in favor of finding that they are religious, beliefs are not protected merely because they are

> strongly held. Rather, *religion typically concerns ultimate ideas about life, purpose, and death.*

Id. (footnotes omitted) (emphasis added) (quoting 29 C.F.R. § 1605.1 (internal quotation marks omitted); *United States v. Meyers*, 906 F. Supp. 1494, 1502 (D. Wyo. 1995) (internal quotation marks omitted), *aff'd*, 95 F.3d 1475 (10th Cir. 1996)); *see also* 3 Lex K. Larson, *Employment Discrimination* § 54.05[4], at 54-13 (2d ed. 2013) ("[A] definition of religion often invoked by the courts is a belief based on a theory of 'man's nature or his place in the Universe' or a belief that 'relates to a Supreme Being.'"). Consequently, "[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII." EEOC Compliance Manual § 12-I(A)(1).

In the EEOC's view, religion is a uniquely personal and individual matter. This view was shaped in no small part by how courts have defined religion for purposes of the First Amendment and other related contexts. *See id.* at § 12-I(A) nn.18-28 and accompanying text (relying heavily on case law from the First Amendment and other contexts to define "religion" for Title VII's purposes); *see also* 29 C.F.R. § 1605.1 (setting forth the EEOC's definition of "religious practices" and noting that it is in accordance with the standard developed by the Supreme Court in *United States v. Seeger*, 380 U.S. 163, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965), and *Welsh v. United States*, 398 U.S. 333, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970)); *cf. EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de P.R.*, 279 F.3d 49, 56 (1st Cir. 2002)

(relying on First Amendment jurisprudence to define "religion" for purposes of Title VII); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 n.12 (7th Cir. 1978) (relying on *Seeger* and *Welsh* to interpret "religious" for purposes of Title VII).

In these First Amendment-related contexts, courts consistently focus on the *individual's* belief system rather than the beliefs of a religious group with which the individual may (or may not) be associated. *See Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (1989) ("[W]e reject the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."); [*Eddie*] *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Seeger*, 380 U.S. at 173, 185, 85 S. Ct. 850 (interpreting the phrase "religious training and belief" in a conscientious-objection statute to require courts "to decide whether the beliefs professed by a registrant are, *in his own scheme of things*, religious" (emphasis added)); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (holding that a Seventh Day Adventist prisoner's religious belief that he must adhere to a vegetarian diet, if sincerely held, was entitled to protection under the First Amendment

even though the district court found that not all Seventh Day Adventists are vegetarian and that the "faith does not *require*" such a diet); *see also* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1235 (4th ed. 2011) ("[R]eligion is inherently personal and an individual might have a sincere religious belief that departs from the dogma of his or her religion. In fact, for this reason, the [Supreme] Court has said [in the First Amendment context] that the dominant views in a faith are not determinative in assessing whether a particular belief is religious.").

Apparently guided by such authorities, the EEOC's Compliance Manual notes:

> [A] person's religious beliefs need not be confined in either source or content to traditional or parochial concepts of religion. A belief is religious for Title VII purposes if it is religious in *the person's own scheme of things, i.e.*, it is a sincere and meaningful belief that occupies *in the life of its possessor* a place parallel to that filled by God. An employee's belief or practice can be religious under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual's belief or practice, or *if few—or no—other people adhere to it.*

EEOC Compliance Manual § 12-I(A)(1) (omission in original) (emphases added) (footnotes omitted) (quoting [*Eddie*] *Thomas*, 450 U.S. at 716, 101 S. Ct. 1425 (internal quotation marks omitted); *Redmond*, 574 F.2d at 901 n.12 (internal quotation marks omitted); *Seeger*, 380 U.S. at 176, 85 S. Ct. 850 (internal quotation marks omitted)); *see also* EEOC, *Questions and*

Answers: Religious Discrimination in the Workplace [hereinafter *EEOC Q & A*], *available at* http://www.eeoc.gov/policy/docs/qanda_religion.html ("An employer also should not assume that an employee is insincere simply because some of his or her practices deviate from the commonly followed tenets of his or her religion."). Therefore, determining "[w]hether a practice is religious depends on *the employee's motivation*. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons."[6] EEOC Compliance Manual § 12-I(A)(1) (emphasis added). Indeed, the EEOC recognizes that the motivation of employees may change over time; they may engage in a practice for religious reasons during one phase of their lives and for secular reasons during another. *See EEOC Q & A*, *supra* ("[A]n individual's beliefs—or degree of adherence—may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.").

These general principles have significant implications for the enforcement of Title VII's proscription against religious discrimination. A couple of points are worth underscoring. First, an applicant or employee

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[6] The EEOC Compliance Manual, citing our decision in *LaFevers*, provides the following example: "[O]ne employee might observe certain dietary restrictions for religious reasons while another employee adheres to the very same dietary restrictions but for secular (*e.g.*, health or environmental) reasons." EEOC Compliance Manual § 12-I(A)(1); *cf. LaFevers*, 936 F.2d at 1119 (recognizing that a Seventh Day Adventist can have a sincere religious belief that he must adhere to a vegetarian diet even though other Seventh Day Adventists do not feel similarly obligated).

may engage in practices that are associated with a particular religion, but do so for cultural or other reasons that are not grounded in that religion. *Cf.* Larson, *supra*, § 54.04, at 54-7 (noting that "one person's political view may well be another's religious conviction"). If so, an employer's discrimination against that individual for engaging in that practice—though possibly reprehensible and worthy of condemnation—would not contravene Title VII's religion-discrimination provisions. That is true of course because, despite the practice's customary association with religion, the applicant's or employee's motivation for engaging in the practice would not be religious.

Second, because religious beliefs have a distinctive content related to ultimate ideas about life, purpose, and death, logically, even if an applicant or employee claims to be acting for "religious" reasons, if those reasons actually do not pertain to such ultimate ideas, then that person's conduct would fall outside the protective ambit of Title VII—*viz.*, the conduct would not truly relate to religious matters. *See* EEOC Compliance Manual § 12-I(A)(1), Ex. 6. ("Personal Preference That is Not a Religious Belief");[7] *see also Reed v.*

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[7] The EEOC has offered the following relevant example:

> Sylvia wears several tattoos and has recently had her nose and eyebrows pierced. A newly hired manager implements a dress code that requires that employees have no visible piercings or tattoos. Sylvia says that her tattoos and piercings are religious because they reflect her belief in body art as self-expression and should be accommodated. However, the evidence demonstrates that her tattoos and piercings are not related to any religious belief system. For example, they do not function as a symbol of any religious belief, and do not relate to any "ultimate

Great Lakes Cos., 330 F.3d 931, 935 (7th Cir. 2003) ("[A]n employee is not permitted to redefine a purely personal preference or aversion as a religious belief."); *Vetter v. Farmland Indus., Inc.*, 120 F.3d 749, 751 (8th Cir. 1997) ("An employer need not accommodate a purely personal preference. " (internal quotation marks omitted)); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 216, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (discussing in the free exercise context the necessity of distinguishing between choices that are "philosophical and personal rather than [ones that are] religious"); *United States v. Meyers*, 95 F.3d 1475, 1483-84 (10th Cir. 1996) (determining, for purposes of the Religious Freedom Restoration Act, whether a belief qualifies as a "religious belief" by assessing, *inter alia*, whether the belief "address[es] fundamental questions about life, purpose, and death"); *id.* at 1484 (agreeing with the district court's conclusion that the defendant's beliefs were not religious in nature despite their being "deeply [held]" and "sincere[]" because they were "derived entirely from his secular beliefs," and collecting cases).

2

The EEOC has presented a religion-discrimination claim based upon Abercrombie's alleged failure to accommodate Ms. Elauf's conflicting religious practice of wearing a hijab. Title VII's implementing regulations

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concerns" such as life, purpose, death, humanity's place in the universe, or right and wrong, and they are not part of a moral or ethical belief system. Therefore, her belief is a personal preference that is not religious in nature.

EEOC Compliance Manual § 12-I(A)(1), Ex. 6.

"impose[] an obligation on the employer 'to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.'" *Thomas*, 225 F.3d at 1155 (quoting 29 C.F.R. § 1605.2(b)(1), (2)); *accord* 42 U.S.C. § 2000e(j); 29 C.F.R. § 1605.2(b)(1); *see Trans World Airlines v. Hardison*, 432 U.S. 63, 74, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977) ("The intent and effect of [Title VII's] definition [of 'religion'] was to make it an unlawful employment practice for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."); *see also Sanchez-Rodriguez v. AT & T Mobility P.R., Inc.*, 673 F.3d 1, 8 (1st Cir. 2012); *Walden v. Ctrs. for Disease Control and Prevention*, 669 F.3d 1277, 1292-93 (11th Cir. 2012) (Seymour, J., sitting by designation).

Religion-accommodation claims are a subset of the types of religion-discrimination claims that an applicant or employee may present under Title VII. *See Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004) ("A claim for religious discrimination under Title VII can be asserted under several different theories, including disparate treatment and failure to accommodate."); *Chalmers v. Tulon Co.*, 101 F.3d 1012, 1018 (4th Cir. 1996) ("[A]n employee is not limited to the disparate treatment theory to establish a discrimination claim. An employee can also bring suit based on the theory that the employer discriminated against her by failing to accommodate her religious conduct." (emphasis omitted)); *see also EEOC Q & A*, *supra* (describing the kinds of religious discrimination

that "Title VII prohibits"). The EEOC has described the specific nature of the claim as follows:

> A religious accommodation claim is distinct from a disparate treatment claim, in which the question is whether employees are treated equally. An individual alleging denial of religious accommodation is seeking an adjustment to a neutral work rule that infringes on the employee's ability to practice his religion. The accommodation requirement is "plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions. "

EEOC Compliance Manual § 12-IV (quoting *Protos v. Volkswagen of Am., Inc.*, 797 F.2d 129, 136 (3d Cir. 1986)).

The reasonable-accommodation principle is implicated only when there is a *conflict* between an employee's religious practice and the employer's neutral policy; only then does a need to accommodate arise. *See id.* § 12-IV(A)(1) (noting the need for the employer to be on notice "both of the need for accommodation and that [the accommodation] is being requested *due to a conflict between religion and work*" (emphasis added)). For there actually to be a conflict, logic dictates that an applicant or employee must consider the religious practice to be an inflexible one—that is, a practice that is required by his or her religious belief system.

It is only in such a situation that applicants or employees would be placed in the position that Title VII was designed to protect them from—the spot where they must choose between their religious convictions

and their job. *See Tiano v. Dillard Dep't Stores, Inc.*, 139 F.3d 679, 682-83 (9th Cir. 1998) (granting summary judgment to the employer on the employee's Title VII religion-accommodation claim because there was no "conflict between [the employee's] religious belief and employment duties" since her religious belief, as she described it, only required her to go on a pilgrimage "at some time" rather than at the specific time she preferred to go); *cf. Reed*, 330 F.3d at 935 (holding that the employee failed to make a prima facie showing on his Title VII religion-accommodation claim because, *inter alia*, he "refuse[d] to indicate at what points [his] faith intersect[ed] the requirements of his job"). In other words, even if applicants or employees engage in a practice for religious reasons, so long as they do not feel obliged to adhere to the practice (that is, do not consider the practice to be inflexible), then there is no actual conflict, nor a consequent need for the employer to provide a reasonable accommodation. *Cf. Turner v. Boy Scouts of Am., Inc.*, No. CIV-09-180-C, 2009 WL 2567962, at *2 (W.D. Okla. Aug. 17, 2009) ("[A]lthough Plaintiff informed [his employer] he was meeting with his pastor, there is no evidence in the record suggesting that Plaintiff informed [his employer] that his religious beliefs *required a meeting* with his pastor at that time or that the meeting was anything other than a personal preference." (emphasis added)).

Notably, however, the EEOC discourages employers from making inquiries in the first instance regarding the religious beliefs or practices of applicants (and presumably employees) because "an applicant's religious affiliation or beliefs are generally viewed

as non job-related and problematic under federal law." EEOC, *Pre-Employment Inquiries and Religious Affiliation or Beliefs* [hereinafter *EEOC Pre-Employment Inquiries*], *available at* http://www.eeoc.gov/laws/practices/inquiries_religious.cfm; *see also Prise v. Alderwoods Grp., Inc.*, 657 F. Supp. 2d 564, 597 (W.D. Pa. 2009) (noting that questioning applicants concerning their religious beliefs could, "under some circumstances, permit an inference to be drawn that an employer engaged in improper religion-based discrimination"); EEOC, *Best Practices for Eradicating Religious Discrimination in the Workplace* [hereinafter *EEOC Best Practices*], *available at* http://www.eeoc.gov/policy/docs/bestpractices_religion.html ("In conducting job interviews, employers can ensure nondiscriminatory treatment by inquiring about matters directly related to the position in question."). Furthermore, in the religion-accommodation context, the EEOC has specifically cautioned employers to "avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate." *EEOC Best Practices, supra; see id.* (noting that "[m]anagers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices").

Thus, it is only *after* an employer is put on notice of the need for a religious accommodation that the EEOC's policy materials encourage it to actively engage in a dialogue with applicants or employees concerning their conflicting religious practice and possible accommodations that the employer might provide for it. *Cf.* Larson, *supra*, § 56.05, at 56-21 ("Indeed, it would seem unreasonable to require an employer to

accommodate the religious practices of an employee when the employer is *unaware* of the *need* to do so." (emphases added)). In this regard, the EEOC has counseled: "Once the employer becomes aware of the employee's religious conflict, the employer should obtain promptly whatever additional information is needed to determine whether an accommodation is available that would eliminate the religious conflict without posing an undue hardship on the operation of the employer's business." EEOC Compliance Manual § 12-IV(A)(2); *see Thomas*, 225 F.3d at 1155 (noting that religious accommodation "involves an interactive process that requires participation by both the employer and the employee"); *EEOC Q & A*, *supra* (commenting that "once on notice that a religious accommodation is needed" an employer is obliged under Title VII "to reasonably accommodate an employee"); *EEOC Best Practices*, *supra* (noting among "[e]mployer [b]est [p]ractices" that "[m]anagers and supervisors should be trained to consider alternative[,] available accommodations if the particular accommodation *requested* would pose an undue hardship" (emphasis added)); *see also EEOC Q & A*, *supra* ("[I]f the employer has a bona fide doubt about the basis for the accommodation request, it is entitled to make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation.").

3

In religion-accommodation cases, we apply a version of *McDonnell Douglas*'s burden-shifting ap-

proach. *See Thomas*, 225 F.3d at 1155; *see also Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010). Specifically, to survive summary judgment on such a claim, "the employee initially bears the burden of production with respect to a prima facie case." *Thomas*, 225 F.3d at 1155. The prima facie case requires the employee to "show that (1) he or she had a bona fide religious belief that conflicts with an employment requirement; (2) he or she *informed his or her employer of this belief*; and (3) he or she was fired [or not hired] for failure to comply with the conflicting employment requirement." *Id.* (emphasis added); *accord Dixon*, 627 F.3d at 855.

If the employee makes out a prima facie case, "[t]he burden then shifts to the employer to (1) conclusively rebut one or more elements of the prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable reasonably to accommodate the employee's religious needs without undue hardship." *Thomas*, 225 F.3d at 1156 (footnote omitted). An accommodation is not reasonable if it would require the employer "to bear more than a de minimis cost." *Trans World Airlines*, 432 U.S. at 84, 97 S. Ct. 2264; *see Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 500 (5th Cir. 2001); *Lee v. ABF Freight Sys., Inc.*, 22 F.3d 1019, 1023 (10th Cir. 1994); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1492 (10th Cir. 1989). And, "if an employer has provided a reasonable accommodation, we need not examine whether alternative accommodations not offered would have resulted in undue hardship." *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008); *see Thomas*, 225 F.3d at 1156 n.7 ("The employer does

not have to demonstrate that the particular accommodation requested by the employee would result in an undue hardship.").

We conclude that Abercrombie is entitled to summary judgment because the EEOC cannot establish the second element of its prima facie case. As discussed below, under the controlling law, the EEOC cannot establish this element because there is no genuine dispute of material fact that Ms. Elauf never informed Abercrombie before its hiring decision that her practice of wearing a hijab was based upon her religious beliefs and that she needed an accommodation for that practice, due to a conflict between it and Abercrombie's clothing policy.

C

In reaching our conclusion that Abercrombie is entitled to summary judgment, we resolve a question vigorously contested by the parties: specifically, whether, in order to establish a prima facie case under Title VII's religion-accommodation theory, a plaintiff ordinarily must establish that he or she initially informed the employer that the plaintiff adheres to a particular practice for religious reasons and that he or she needs an accommodation for that practice, due to a conflict between the practice and the employer's neutral work rule. We answer that question in the affirmative. Consequently, because Ms. Elauf did not inform Abercrombie prior to its hiring decision that she engaged in the conflicting practice of wearing a hijab for religious reasons and that she needed an accommodation for it, the EEOC cannot establish its prima facie case.

Our conclusion naturally rests, first, on our own express articulation of the plaintiff's prima facie burden, which is bolstered by a similar linguistic formulation of that burden found in rulings of several of our sister circuits. Second, we are fortified in our conclusion because the concepts of religion and interactive accommodation—as they are given substance in the Title VII context—virtually oblige us, as a logical matter, to insist that ordinarily the applicant or employee must initially provide the employer with explicit notice of the conflicting religious practice and the need for an accommodation for it, in order to have an actionable claim for denial of such an accommodation. Third, we discern support for our conclusion in the plain terms of the EEOC's own regulatory pronouncements on the notice obligations of applicants or employees in the religion-accommodation setting. Lastly, we are bolstered in our position by the fact that our reading of the statute's notice requirement is entirely consistent with the approach toward notice that the courts have taken, for purposes of assessing an employer's duty to accommodate, in the undisputedly analogous context of disability discrimination under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213.

The EEOC has vigorously contested this possible outcome. As the district court put it, "The EEOC urges a less restrictive approach, asserting that although Abercrombie is required to have had notice that Elauf needed an accommodation, the notice need not have been strictly in the form of Elauf verbally requesting such an accommodation." Aplt. App. at 580. More specifically, the EEOC has succinctly made the point before us: "The employer's obligation is to at-

tempt reasonable accommodation (where no undue hardship would result) when it has notice—be it from an affirmative statement by the individual, *or some other source*—of an individual's religious belief that conflicts with a work requirement." Aplee. Br. at 41 (emphasis added); *see also id.* at 32-33 ("[W]hen the facts indicate that notice of an individual's religious belief was provided by some means other than the individual affirmatively 'informing' the employer of the belief, the prima facie notice requirement should be flexibly interpreted to conform to such factual situations."). For the reasons discussed below, we are unpersuaded by the EEOC's position.

1

a

First of all, we construe our precedent (by its plain terms) as placing the burden on applicants or employees to initially inform employers of the religious nature of their conflicting practice and of the need for an accommodation. *See, e.g., Thomas*, 225 F.3d at 1155 (noting that the employee (or prospective employee) must establish that "he or she informed his or her employer of this [religious] belief" that conflicts with the employer's work requirement); *accord Toledo*, 892 F.2d at 1486.

Insofar as the plain language of our precedent leaves room for doubt on the question, construing it to require the applicant or employee to initially inform the employer of the conflicting religious practice and the need for an accommodation aligns our court with a substantial body of circuit precedent that we find persuasive. *See, e.g., Wilkerson v. New Media Tech.*

Charter Sch. Inc., 522 F.3d 315, 319 (3d Cir. 2008) (outlining a prima facie showing that obliges the employee to demonstrate that "she told the employer about the conflict" between her religious belief and the employer's work rule); *Reed*, 330 F.3d at 935 ("Title VII imposes a duty on the employer but also a reciprocal duty on the employee to give fair warning of the employment practices that will interfere with his religion and that he therefore wants waived or adjusted."); *Chalmers*, 101 F.3d at 1019 ("As [the plaintiff] recognizes, a prima facie case under the accommodation theory requires evidence that she informed her employer that her religious needs conflicted with an employment requirement and asked the employer to accommodate her religious needs."); *Johnson v. Angelica Uniform Grp., Inc.*, 762 F.2d 671, 673 (8th Cir. 1985) (noting that under the second element of the religion-accommodation prima facie case, the plaintiff must establish that "he has informed his employer about the conflict" between his religious belief and the employer's work requirement); *cf. Xodus v. Wackenhut Corp.*, 619 F.3d 683, 685 (7th Cir. 2010) (noting that the plaintiff "had to prove" during a bench trial "that he brought his religious practice to the company's attention"). And our view of the notice requirement also has been endorsed by respected secondary authority. *See* Larson, *supra*, § 55.01, at 55-3 ("One must begin with the well-known *McDonnell Douglas* description of the plaintiff's prima facie case, though, with religious discrimination, an important addition to the prima facie case is *the requirement* that the plaintiff communicate his or her bona fide religious belief to the employer." (emphasis added) (footnote

omitted)); *id.* § 56.05, at 56-21 ("Note that in establishing a prima facie case an employee is required to notify an employer of the need for accommodation.").

b

The EEOC seeks to escape the effect of our decisions in *Toledo* and *Thomas*—which, on their face, seem to require an employee (or prospective employee) to establish that "he or she informed his or her employer of this [religious] belief" that conflicts with the employer's work requirement. *Thomas*, 225 F.3d at 1155; *accord Toledo*, 892 F.2d at 1486. The EEOC maintains that these cases "did not address whether the only permissible source of the employer's awareness of the subject religious belief was the employee or applicant herself." Aplee. Br. at 36-37; *see id.* at 36 ("In *Thomas* this Court was *not* faced with the question of whether to establish a prima facie case, the plaintiff had to produce evidence that the employer's awareness of her religious belief came from her and not some other source."). The district court agreed that our precedent, and notably *Thomas*, did not resolve this notice question. *See* Aplt. App. at 580 (citing *Thomas* and noting that "the Tenth Circuit has not addressed the question of whether notice must be explicitly requested by the employee"). Even under the linguistic formulation of the second element of the prima facie case found in *Toledo* and *Thomas*, reasons the EEOC, "the critical fact is the *existence* of the notice itself, not *how* the employer came to have such notice." Aplee. Br. at 31.

As support for its broader view of the notice requirement, the EEOC relies on the Eleventh Circuit's

decision in *Dixon*, 627 F.3d 849, and the district court's decision in *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999). *See* Aplee. Br. at 30-31. The district court in the instant case reached a similar conclusion regarding the notice requirement. *See* Aplt. App. at 581 ("[F]aced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice [that] an accommodation is needed[,] the Tenth Circuit would likely opt for the latter choice." (footnote omitted)). In doing so, it cited the same authorities as the EEOC, and additional ones. *See id.* at 580-81 (citing, in addition, *Brown v. Polk Cnty.*, 61 F.3d 650, 654 (8th Cir. 1995) (en banc)); *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). However, as a general matter, we are not persuaded by the EEOC's position.

To begin, we are not convinced that we are at liberty to disregard the plain terms of our *Toledo* and *Thomas* decisions, which place the prima facie burden on the plaintiff to establish that the applicant or employee has initially informed the employer of the conflicting religious practice and the need for an accommodation. Moreover, even if the plain language of our precedent left the resolution of the question unclear, construing that language to require the applicant or employee to initially inform the employer of the conflicting religious practice and the need for accommodation aligns our court with a substantial body of circuit precedent. And, for the reasons that we explicate in Part II.C.2-4, *infra*, we believe that these authorities embody the sounder legal view.

Furthermore, even were we to assume that *Toledo* and *Thomas* would permit a plaintiff to establish a prima facie case without demonstrating that the applicant or employee was the source of the employer's notice of the need for a religious accommodation, the EEOC could not prevail here. That is because such notice would need to be based on an employer's particularized, *actual* knowledge of the key facts that trigger its duty to accommodate. And, as explicated below, there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had such *actual* knowledge—*from any source*—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it.[8]

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[8] Under Title VII, an employer is defined to include "any agent," 42 U.S.C. § 2000e(b), and, in varying degrees, an employer may be held responsible for the conduct of its agents. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) ("We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area."). In the Title VII disparate-treatment context, ordinarily the identity of the person acting as the employer's decision-maker in the particular employment decision is a significant fact—although not necessarily a determinative one. *See Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1166 (10th Cir. 2007) (en banc) ("In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision*." (quoting *Watts v. City of Norman*, 270 F.3d 1288, 1295 (10th Cir. 2001)) (internal quotation marks omitted)); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006) ("In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who *lacks decisionmaking power*, uses the formal decisionmaker as

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a dupe in a deliberate scheme to trigger a discriminatory employment action." (emphasis added)); *cf. Conroy v. Vilsack*, 707 F.3d 1163, 1173 n.3 (10th Cir. 2013) (noting that the plaintiff "does not articulate a cat's paw theory of liability"). The district court determined that Ms. Cooke "had responsibility for hiring decisions at the Abercrombie" store where Ms. Elauf sought employment. Aplt. App. at 581 n.11. Abercrombie argues to the contrary; it asserts that the decision-maker was Mr. Johnson, noting that "both Cooke and Johnson identified Johnson as the decision-maker." Aplt. Opening Br. at 16 n.7. In *Thomas*, we recognized that, although we employ the *McDonnell Douglas* framework in the religion-accommodation context—as we do in the disparate-treatment context—the nature of the inquiry is distinct. *See* 225 F.3d at 1155 n.6 (noting that "the burden-shifting mechanism" of *McDonnell Douglas* is employed "not to probe the subjective intent of the employer" but rather to permit courts in the summary judgment context to "determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered" (quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 n.12 (10th Cir. 1999) (en banc)) (internal quotation marks omitted)). Whether the identity of the decision-maker is also a significant fact in the religion-accommodation context is a question that we need not endeavor to answer here. *Cf. Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 874 (9th Cir. 1989) (analyzing a Washington State disability statute requiring employers "to make a reasonable accommodation" and noting "we believe that the district court erred in finding that [the employer's] management's lack of personal knowledge of [the employee's] migraine condition insulates the company from liability; [the employer] was in fact on notice of [the employee's] condition as a result of [the employee's] supervisor's full awareness of his condition and thus must be held responsible for any failure to attempt a reasonable accommodation"). It is undisputed that Ms. Cooke and Mr. Johnson were agents of Abercrombie; that fact suffices for our purposes. If, as we demonstrate *infra*, there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process—that is, Ms. Cooke and Mr. Johnson—

The authorities that the EEOC and the district court have relied upon clearly have predicated their notice holdings on the employer's particularized, actual knowledge. We need not (and do not) endorse their specific holdings and, in particular, their conclusions about how much actual knowledge is sufficient to put an employer on notice of the need to accommodate; yet, there is no doubt that these cases settled for nothing less than some significant measure of particularized, actual knowledge.

In *Dixon*, for example, the plaintiffs "presented evidence that they are sincere, committed Christians who oppose efforts to remove God from public places." 627 F.3d at 855. In rejecting the employer's contention that the plaintiffs had never advised them of their need for a religious accommodation, the Eleventh Circuit stated:

> [The employer] knew that the [plaintiffs] were dedicated Christians who had previously opposed policies prohibiting the public display of religious items. [The employer] argues that the [plaintiffs] never expressly told [their supervisor] that they did not want to take down their artwork because they opposed efforts to remove God from public places. However, we conclude that if [the supervisor] was aware of the tension between her order and the [plaintiffs'] religious beliefs—and

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possessed particularized, actual knowledge, from any source, that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it, it ineluctably follows that no Abercrombie decision-maker (whether Ms. Cooke or Mr. Johnson, or both) possessed this requisite knowledge.

there is ample evidence that she was—her awareness would satisfy the second prong.

Id. at 855-56. In other words, in concluding that the plaintiffs had satisfied the second element of their prima facie case related to notice, the Eleventh Circuit determined that the employer had actual knowledge of the religious beliefs of the particular plaintiffs and of the actual conflict between those beliefs and the employer's work rules. As to the latter point, based upon the plaintiffs' prior affirmative and open opposition to the employer's policies regarding the display of religious items, the employer had actual knowledge that the plaintiffs' beliefs about the removal of God from public places were inflexible and not simply a personal preference.

The district court in *Hellinger* (the other case upon which the EEOC relies) put an even finer point on the actual-knowledge issue. The plaintiff there was "an Orthodox Jew" who "applied for a part-time position with [the employer] as a pharmacist." 67 F Supp. 2d at 1361. "Although Plaintiff cannot sell condoms due to his religious beliefs, he did not list any religious restrictions on his application or make any request for an accommodation. Nor did he inform [the employer's hiring agent] about his religious beliefs or restrictions at the time he dropped off his application." *Id.*

It was undisputed that the employer's hiring agent was "informed" by another of its employees, who was listed as "one of the Plaintiff's references," "that the Plaintiff refused to sell condoms due to his religious beliefs" and that the hiring agent, consequently, "decided not to pursue the Plaintiff's application for em-

ployment." *Id.* Nevertheless, the employer "argue[d] that the Plaintiff cannot establish a *prima facie* case of religious discrimination because the Plaintiff did not inform the Defendant of his religious restriction or his need for accommodation." *Id.* at 1360. The district court would have none of that argument. Although the district court cautioned that it was "not plac[ing] the burden of inquiry on the employer," *id.* at 1364, it held "that the Plaintiff sets forth a *prima facie* case of religious discrimination because [the employer] had actual knowledge of the Plaintiff's religious beliefs and decided not to pursue the Plaintiff's employment application based on that information," *id.* at 1360.

Furthermore, the additional authorities that the district court relied upon in the instant case are of the same or similar effect in that they insist on nothing less than the employer's particularized, actual knowledge to satisfy the second element of the prima facie case. *See Brown*, 61 F.3d at 654 ("[W]e reject the defendants' argument that because [the plaintiff] never explicitly asked for accommodation for his religious activities, he may not claim the protections of Title VII. Because the first reprimand related directly to religious activities by [the plaintiff], we agree with the district court that the defendants were well aware of the potential for conflict between their expectations and [the plaintiff's] religious activities."); *Heller*, 8 F.3d at 1436, 1439 (holding that the plaintiff established the second element of his prima facie case for failure to accommodate his "religious practice of attending the ceremony in which his wife and children were converted to Judaism," where the plaintiff's supervisor "knew" that he was Jewish, "knew" that his

"wife was studying for conversion," and "when [the plaintiff] requested the time off, he informed the [supervisor] why he needed to miss work").

In other words, even were we to assume that an employer may be put on notice from a source other than applicants or employees, that source would need to provide the employer with sufficient information such that the employer would have actual knowledge that the conflicting practice of the *particular* applicants or employees is based upon their religious beliefs and that they need an accommodation for it. Thus, even under this broader view of the notice requirement, a plaintiff—that is, an applicant or employee—should not be able to impose liability on an employer for failing to accommodate his or her religious practice on the ground that the employer should have guessed, surmised, or figured out from the surrounding circumstances, that the practice was based upon his or her religion and that the plaintiff needed an accommodation for it. Accordingly, even were we to adopt the EEOC's position, as supported by its authorities, the employer's notice would need to be based upon its particularized, actual knowledge of the key facts that trigger its duty to provide a reasonable religious accommodation—that is, based upon actual knowledge that the conflicting practice of the *particular* applicant or employee stems from his or her religion and that the applicant or employee needs an accommodation for it (because the practice is an inflexible one).

The EEOC cannot make this showing here: there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring

process had particularized, actual knowledge—*from any source*—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it. Therefore, the EEOC cannot prevail.

In particular, we conclude that the record offers absolutely no support for the district court's determination that Ms. "Cooke *knew* [that Ms. Elauf] wore the head scarf based on her religious belief." Aplt. App. at 581 (emphasis added). The EEOC also is clearly mistaken on this point. *See* Aplee. Br. at 46 ("It is uncontested that Cooke was aware of Elauf's religious belief and its conflict with the Look Policy. "). At best, when viewed in the light most favorable to the EEOC, the record indicates that Ms. Cooke *assumed* that Ms. Elauf wore her hijab for religious reasons and felt religiously obliged to so—thus creating a conflict with Abercrombie's clothing policy.

More specifically, Ms. Cooke testified as follows: that she had seen Ms. Elauf wearing a headscarf prior to the interview, but "did not know" Ms. Elauf's religion, Aplt. App. at 365; that she "*assumed* that she was Muslim," *id.* (emphasis added), and "*figured* that was the religious reason why she wore her head scarf," Aplee. Supp. App. at 48 (emphasis added), and she assumed that, if Ms Elauf were hired by Abercrombie as a Model, she would continue to wear her headscarf, *see id.* at 46 (answering "Yes, I did." to the question, "And you assumed if [Ms. Elauf] worked at Abercrombie, she would still be wearing [a headscarf]?").

In the interview, Ms. Cooke did not ask Ms. Elauf if she was a Muslim. And for reasons that we have ex-

plored at length, *see* Part II.B.1, *supra*, given Title VII's conception of religion as a uniquely personal and individual matter, Ms. Cooke's knowledge that Ms. Elauf elected to wear a hijab would be far from sufficient information to provide her with the requisite notice that would trigger an employer's duty to accommodate. *See Wilkerson*, 522 F.3d at 319 ("[S]imply announcing one's belief in a certain religion, or even wearing a symbol of that religion (i.e., a cross or Star of David) does not notify the employer of *the particular beliefs and observances* that the employee holds in connection with her religious affiliation." (emphasis added)); *Reed*, 330 F.3d at 935-36 ("A person's religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka, this may not pinpoint *his particular beliefs and observances.* " (emphasis added)); *see also* Aplt. App. at 292 (indicating that the EEOC's expert offered, as an explanation for why people maintain certain styles of dress, "it really is, the question is, what is their motivation"). In sum, Ms. Cooke's testimony does not even come close to establishing that Ms. Cooke possessed particularized, actual knowledge that Ms. Elauf (and not some hypothetical Muslim female) wore a hijab because of *her* Islamic faith and felt religiously obliged to do so, and thus would require a religious accommodation in order to address the conflict with Abercrombie's clothing policy.[9]

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[9] The EEOC suggests that, even if Ms. Cooke's understanding of Ms. Elauf's religious beliefs and her need for an accommodation was solely predicated on her assumption, her assumption was actu-

Moreover, even construing the facts (as we must) in the light most favorable to the EEOC, the fact that Ms. Cooke called Mr. Johnson to discuss the possibility of an accommodation does nothing to rectify this fundamental evidentiary deficiency in the EEOC's case. Ms. Cooke's conduct following the interview was all based on her admitted *assumption* regarding Ms. Elauf's religious beliefs and required practices. *See*

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ally correct, so Abercrombie was put on adequate notice. *See* Aplee. Br. at 45 ("It is uncontested that Cooke correctly interpreted Elauf's wearing a headscarf as indicating that she is Muslim and wore the headscarf for a religious purpose. As such, the court would still be correct that it was uncontested that Abercrombie was on sufficient notice of Elauf's religious belief."). There is no foundation in the law for the view that the requisite notice for purposes of a Title VII religion-accommodation claim could ever conceivably rest on anything less than an employer's particularized, *actual* knowledge; that an employer was able to make a correct guess or assumption would not mean that the employer possessed such actual knowledge. Simply put, a correct assumption does not equal actual knowledge. And this basic truth takes on considerable significance in the religion-accommodation context because once the employer is found to have received sufficient notice, the employer must actively engage in the interactive accommodation process. But an employer would not know whether its guess or assumption was correct until after the fact, so there would be instances in which the employer would begin participating in the interactive process based upon a guess or assumption—and invariably discuss or explore the purported religious beliefs and needs of an applicant or employee—when there actually was no need to do so (i.e., because the employer's assumption or guess was wrong). This approach would run afoul of the EEOC's own express policy guidance, which discourages employers from initiating discussions about the religious beliefs of applicants (or employees) and from operating in the accommodation process based upon stereotypes, speculation, and conjecture. *See* Part II.B.2, *supra*.

Aplt. App. at 76-77 ("I was unsure about the head scarf. I told [Mr. Johnson] that I *believed* that [Ms. Elauf] was Muslim, and that was a recognized religion. And that she was wearing it for religious reasons." (emphasis added)). She did not possess the requisite actual knowledge concerning these matters. And any awareness that Mr. Johnson had of Ms. Elauf's religious beliefs and required practices would have been derived solely from Ms. Cooke's assumption; so, Mr. Johnson, too, possessed no particularized, actual knowledge.

Yet, the only two Abercrombie agents who could conceivably be deemed to have had any responsibility for, or involvement in, the hiring process regarding Ms. Elauf, were Ms. Cooke and Mr. Johnson.[10] Therefore, even if the EEOC were permitted as a matter of law to establish the second element of its prima facie case by showing that the employer possessed particularized, actual knowledge from a source *other than* the applicant or employee of the key facts that trigger its duty to provide a reasonable religious ac-

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[10] It is true that, in responding to Ms. Elauf's inquiry about wearing a headscarf, Ms. Sepahvand (her friend and an Abercrombie employee) testified that she had raised the issue with assistant manager Kalen McJilton, who knew Ms. Elauf from her prior visits to the store. Noting that he had previously worked at Abercrombie with someone who wore a white yarmulke, Mr. McJilton suggested that he did not see any problem with Ms. Elauf wearing a headscarf, "especially if she didn't wear a headscarf that was black." Aplee. Supp. App. at 181 (internal quotation marks omitted). However, there is no evidence that Mr. McJilton had any responsibility for, or involvement in, the hiring process regarding Ms. Elauf.

commodation, the EEOC could not do so here because neither Ms. Cooke nor Mr. Johnson (i.e., the relevant agents of the employer) possessed such knowledge. Accordingly, even under the broader view of the notice requirement that the EEOC principally espouses here, it cannot prevail.[11]

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[11] We note that the EEOC also takes a different tack to defeat this outcome. Recall that, following her discussion with Mr. McJilton, Ms. Sepahvand communicated to Ms. Elauf that a headscarf would be permitted, but because of Abercrombie's no-black-clothing policy, she would not be able to wear a black one. Based upon this relaying of information, the EEOC argues that "there is no evidence suggesting that Elauf had any reason to believe that her headscarf had not already been approved by Abercrombie, or that Elauf had any reason to ask any questions about her headscarf at the interview." Aplee. Br. at 45. The EEOC's argument, however, is wholly unpersuasive. Ms. Elauf could not possibly have formed a reasonable judgment in these circumstances based upon second-hand information delivered by her friend, Ms. Sepahvand—who was not herself a member of Abercrombie management, nor involved in Ms. Elauf's hiring process—that Abercrombie had agreed to accommodate her practice of wearing a hijab and, as a consequence, that she was free to remain silent about that practice in the interview. This is especially true because, prior to the interview, Ms. Elauf was well aware that employee attire was a significant matter to Abercrombie—that is, a matter of considerable consequence—and the person who Ms. Elauf reasonably could have concluded had some responsibility in her hiring process, Ms. Cooke, expressly raised the topic of employee attire in the interview *without* indicating that Abercrombie would accommodate Ms. Elauf's practice of wearing a hijab. Contrary to the EEOC's contention, then, we conclude that there was no evidence to reasonably support the notion that Abercrombie's conduct led Ms. Elauf to believe she had no need to speak up to secure an accommodation for her claimed religious practice of wearing a headscarf.

We do recognize that in its briefing, the EEOC intimates that something less than an employer's particularized, actual knowledge would suffice. *See* Aplee. Br. at 34 ("[T]his is not to say that employers are required to inquire of applicants or employees as to whether there are any religious beliefs that need to be accommodated, absent *some reasonable indication* to the employer that an accommodation *may* be needed." (emphases added)). However, it cites no authorities to support this proposition, and we are not aware of any. *See* Aplt. Reply Br. at 2 ("Had courts intended that 'reasonable indication' (or some other sort of construc-

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Moreover, lest there be any doubt, an employer is not legally obligated under Title VII to prompt applicants or employees to deliver notice of the need for a religious accommodation, by initially recounting a laundry list of all of the practices that employees *cannot* do in the workplace. The burden rests with applicants or employees to ensure that the workplace will be a suitable work environment for them, in light of their required religious practices. *See Chalmers*, 101 F.3d at 1019 ("Initially, [the plaintiff] asserts that [the employer] never explicitly informed her of a company policy against writing religious letters to fellow employees at their homes and so she had no reason to request an accommodation. However, companies cannot be expected to notify employees explicitly of all types of conduct that might annoy co-workers, damage working relationships, and thereby provide grounds for discharge." (citation omitted) (internal quotation marks omitted)). Thus, the EEOC's suggestion to the contrary is misguided. *See* EEOC Response to Abercrombie's Rule 28(j) Letter, No. 11-5110, at 1 (10th Cir., filed May 11, 2012) ("[I]t is uncontested that Elauf was not informed at any time by Abercrombie that it has an unwritten prohibition on Models wearing headscarves. Therefore, there was no reason for Elauf to believe there was any conflict requiring accommodation." (citation omitted)); *see also* Aplt. App. at 55 (testifying that Ms. Cooke did not tell her (Ms. Elauf) that she "wouldn't be able to wear [her headscarf] or anything like that").

tive notice) be sufficient to satisfy the *prima facie* case, they would have said so.")

In sum, we hold that, in order to establish the second element of their prima facie case under Title VII's religion-accommodation theory, ordinarily plaintiffs must establish that they initially informed the employer that they engage in a particular practice for religious reasons and that they need an accommodation for the practice, due to a conflict between the practice and the employer's work rules. As noted, we recognize that some courts have taken a different path on this question. However, we are confident that our approach is the sounder one.

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Given Title VII's conception of religion and the interactive nature of the religion-accommodation process, we are hard-pressed to see how we could logically reach another conclusion regarding the notice element of the prima facie case. This is because the answers to the key questions that determine whether an employer has an obligation under Title VII to provide a reasonable religious accommodation ordinarily are only within the ken of the applicant or employee; because an employer's obligation to engage in the interactive religion-accommodation process is only triggered when the employer has answers to those questions; and because, in implementing Title VII's anti-discrimination mandate, the EEOC has expressly disapproved of employers inquiring in the first instance or speculating about the answers to such questions.

For example, recall that Title VII only obliges employers to provide a reasonable accommodation for

practices that applicants or employees engage in because of bona fide, sincerely held religious beliefs. *See, e.g.*, *EEOC Q & A*, *supra* ("Title VII requires employers to accommodate only those religious beliefs that are religious and sincerely held. " (internal quotation marks omitted)). As noted, those beliefs are defined broadly, but "typically concern[] ultimate ideas about life, purpose, and death." EEOC Compliance Manual § 12-I(A)(1) (internal quotation marks omitted). Title VII does not extend its protections to practices that are engaged in as a matter of personal preference or for cultural reasons, *see, e.g.*, *Reed*, 330 F.3d at 935 ("[A]n employee is not permitted to redefine a purely personal preference or aversion as a religious belief."), and no matter how strongly an applicant or employee believes in certain political, economic, or social ideas, if those ideas do not otherwise relate to the stuff of religion (e.g., ultimate notions about life, purpose, or death), then practices based upon them do not fall within Title VII's protective ambit, *see, e.g.*, EEOC Compliance Manual § 12-I(A)(1).

But how is an employer to know that applicants or employees are engaged in a practice for religious reasons, unless they inform the employer? *Cf. id.* ("Determining whether a practice is religious turns not on the nature of the activity, but on the employee's motivation. The same practice might be engaged in by one person for religious reasons and by another person for purely secular reasons."). To be sure, in certain instances, applicants or employees may engage in practices that are traditionally associated with a particular religion. However, Title VII does not require employers to become knowledgeable about the customs

and observances of religions. *See, e.g., Wilkerson*, 522 F.3d at 319 ("[W]e do not impute to the employer the duty to possess knowledge of particularized beliefs of religious sects."); *Reed*, 330 F.3d at 936 (noting that "employers are not charged with detailed knowledge of the beliefs and observances associated with particular sects"); EEOC Compliance Manual § 12-IV(A)(1) (noting that an employee "cannot assume that the employer will already know or understand" "the religious nature of the belief or practice at issue").

Furthermore, even if an employer was generally aware of the beliefs and observances that are traditionally associated with a particular religious group, and also knew that the applicant or employee displayed symbols associated with that group—or even that the applicant or employee specifically claimed to be a member of that group—ordinarily, the employer would still not know whether the conflicting practice in question actually stemmed from religious beliefs unless the particular applicant or employee informed the employer, because under Title VII, as we have discussed, religion is a uniquely personal and individual matter. *See, e.g.*, EEOC Compliance Manual § 12-I(A)(1) ("An employee's belief or practice can be 'religious' under Title VII even if the employee is affiliated with a religious group that does *not* espouse or recognize that individual's belief or practice, or if few—or no—other people adhere to it." (emphasis added)); *see also id.* ("[A] person's religious beliefs need not be confined in either source or content to traditional or parochial concepts of religion. A belief is religious for Title VII purposes if it is *religious in the person's own scheme of things.* " (emphasis added) (footnotes omitted)

(internal quotation marks omitted)). In holding that Title VII places a "duty on the employee to give fair warning of the employment practices that will interfere with his religion," *Reed*, 330 F.3d at 935, the Seventh Circuit succinctly and cogently touched on a like point. Specifically, the court in *Reed* stated: "A person's religion is not like his sex or race—something obvious at a glance. Even if he wears a religious symbol, such as a cross or a yarmulka, this may not pinpoint *his particular beliefs and observances.*" *Id.* at 935-36 (emphasis added).

Similarly, in upholding the dismissal of the plaintiff's religion-accommodation claim because she failed to inform her employer of her need for an accommodation due to a conflict between her Christian beliefs and the employer's "libation" or alcohol-drinking ceremony, the Third Circuit in *Wilkerson* rejected the plaintiff's suggestion that the employer's knowledge that she was a Christian was enough to trigger its accommodation obligation. Specifically, the Third Circuit stated, "that [the employer] knew she was a Christian does not sufficiently satisfy [the plaintiff's] duty to provide 'fair warning' to [the employer] that *she possessed a religious belief* that specifically prevented her from participating in the libations ceremony." *Wilkerson*, 522 F.3d at 319 (emphasis added). Indeed, the Third Circuit went further and concluded that even if the employer "suspected" that the libations ceremony would be specifically offensive to the plaintiff, that would not relieve the plaintiff of the obligation to "inform the defendants that the libation ceremony would offend *her religious beliefs.*" *Id.* at 319-20 (emphasis added). In the same vein, in upholding the denial of

the plaintiff's religion-accommodation claim, the Fourth Circuit rejected the plaintiff's argument that the employer's knowledge of the plaintiff's strongly held religious beliefs was enough to "put it on notice" that those beliefs would—*in the plaintiff's view*—oblige her to "write, and send, personal, accusatory letters to co-workers at their homes." *Chalmers*, 101 F.3d at 1020 n.3. Therefore, even if an employer were on notice that an applicant or employee subscribed to a particular religious belief system, because religion under Title VII is a uniquely personal matter, that information would not be enough to tell the employer what practices are religious in "the person's own scheme of things." EEOC Compliance Manual § 12-I(A)(1) (internal quotation marks omitted). Ordinarily, the only way the employer would know such information is if the applicant or employee informed the employer.

Knowing this much demonstrates why the most natural reading of Title VII's religion-accommodation provision is one that ordinarily places the burden on the applicant or employee to inform the employer of the conflicting religious practice and the need for an accommodation, and why a contrary reading of the statute would be patently unfair to employers. *Reed* provides a hypothetical that powerfully underscores this point:

> Suppose the employee is an Orthodox Jew and believes that it is deeply sinful to work past sundown on Friday. He does not tell his employer, the owner of a hardware store that is open from 9 a.m. to 6 p.m. on Fridays, who leaves the employee in sole

> charge of the store one Friday afternoon in mid-winter, and at 4 p.m. the employee leaves the store. The employer could fire him without being thought guilty of failing to accommodate his religious needs.

330 F.3d at 936. A contrary reading of the statute would be, we think, misguided and quite unfair because "at that time" when the employer fired the employee "there was nothing to accommodate." *Wilkerson*, 522 F.3d at 319. As in *Reed*, "[t]his case is similar" to the hypothetical: Ms. Elauf undisputedly did not inform Abercrombie that her conflicting practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation; consequently, as with the hypothetical employer, Abercrombie could elect not to hire Ms. Elauf "without being thought guilty of failing to accommodate [her] religious needs." 330 F.3d at 936. Nothing was present to accommodate.

Moreover, contrary to the EEOC's suggestion at oral argument, *see* Oral Arg. at 26:40-27:10, the fact that an applicant's headscarf (like Ms. Elauf's) was visible would not materially distinguish her circumstances from those of the person whose religious beliefs did not allow for work on the Sabbath. Even though that person's religious beliefs regarding the Sabbath would be invisible to the naked eye, so would the religious significance that the applicant attached to wearing the headscarf. As noted, Muslim women (and certainly non-Muslim women) wear headscarfs for reasons other than religion, and whether they are doing so for religious reasons depends on their (invisible) "motivation." EEOC Compliance Manual § 12-I(A)(1);

see Aplt. App. at 292 (indicating that the EEOC's expert opined, regarding the reasons why people maintain certain dress, "it really is, the question is, what is their motivation"). Therefore, employers confronted with the Sabbath-adherent and the headscarf-wearer would be similarly situated—that is, they would not reasonably be put on notice of the need for a religious accommodation unless they were informed of it by the applicant.

Lastly, even if an employer has particularized, actual knowledge of the religious nature of the practice —that is, knowledge that the practice of a *particular* applicant or employee stems from his or her religious beliefs—that still would not be sufficient information to trigger the employer's duty to offer a reasonable accommodation. That is because the applicant or employee may not actually *need* an accommodation. In other words, an applicant or employee may not consider his or her religious practice to be inflexible; that is, he or she may not feel obliged by religion to adhere to the practice. If that is the situation, then there actually is no conflict, nor a consequent need for the employer to provide a reasonable accommodation. Given that "[a] belief is religious for Title VII purposes if it is religious in *the person's own scheme of things*," EEOC Compliance Manual § 12-I(A)(1) (emphasis added) (internal quotation marks omitted), whether a particular practice is religiously *required* is ultimately a question that only a particular individual can answer—even if the same practice is customarily required in the religion that the person claims to follow. *Cf. Turner*, 2009 WL 2567962, at *2 (noting that the record did not indicate that the plaintiff ever told his employer "that

his religious beliefs *required a meeting* with his pastor at that time or that the meeting was anything other than a personal preference" (emphasis added)).

As we suggested in *Thomas*, Title VII's "interactive process requires participation by *both* the employer and the employee." 225 F.3d at 1155 (emphasis added). Yet, how can an employer meaningfully participate in the accommodation process, when it lacks concrete information from which to discern a need to do so? *See Wilkerson*, 522 F.3d at 319 ("Because [the plaintiff] did not inform [her employer] that the [libation] ceremony presented a [religious] conflict, it did not have a duty to accommodate her. Although [the plaintiff] told [her employer] after the fact, *at that time there was nothing to accommodate.*" (emphasis added)); Larson, *supra*, § 56.05, at 56-21 ("Indeed, it would seem unreasonable to require an employer to accommodate the religious practices of an employee when the employer is *unaware* of the *need* to do so." (emphases added)).

It is true that logic does not perforce dictate that just because the foregoing critical questions ordinarily must be answered by the particular applicant or employee, before the employer's duty to offer a reasonable accommodation is triggered, that the applicant or employee must *initiate* the communication: it is conceivable that one could fashion a regulatory regime in which the employer was obliged to inquire in the first instance concerning the religious beliefs and needs of applicants or employees. Yet, under Title VII's interactive accommodation scheme, it is clear that, not only is the employer not obliged to make such religious in-

quiries, the employer is *affirmatively discouraged* from doing so because "an applicant's religious affiliation or beliefs are generally viewed as non job-related and problematic under federal law." *EEOC Pre-Employment Inquiries, supra; see, e.g., Prise*, 657 F Supp. 2d at 597 (noting that questioning applicants concerning their religious beliefs could, "under some circumstances, permit an inference to be drawn that an employer engaged in improper religion-based discrimination"); *EEOC Best Practices, supra* ("In conducting job interviews, employers can ensure nondiscriminatory treatment by inquiring about matters directly related to the position in question."). Furthermore, as we have discussed, in the religion-accommodation context, the EEOC has specifically cautioned employers to "avoid assumptions or stereotypes about what constitutes a religious belief or practice or what type of accommodation is appropriate." *EEOC Best Practices, supra; see id.* (noting that "[m]anagers and employees should be trained not to engage in stereotyping based on religious dress and grooming practices"). Thus, if under Title VII an employer is affirmatively discouraged from asking applicants or employees whether their seemingly conflicting practice is based on religious beliefs, and, if so, whether they actually will need an accommodation for the practice, because it is inflexible (i.e., truly conflicting), *and* the employer also is discouraged by the EEOC from speculating about such matters, then the interactive accommodation process ordinarily only can be triggered when applicants or employees first provide the requisite information to the employer.

In sum, in light of Title VII's conception of religion and the interactive nature of the religion-accommodation process, we have difficulty seeing how we could logically reach a conclusion other than the one that we explicate here regarding the notice element of the prima facie case.

3

a

We also find further support for our view of the notice requirement—which places the onus on the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation—in references found in the EEOC's own regulations and policy documents regarding the source of the employer's notice. These authorities—repeatedly, expressly, and unequivocally—assign the notice responsibility to the applicant or employee. Beginning with its substantive regulation, the EEOC states, "*After an employee or prospective employee notifies* the employer of his or her need for a religious accommodation, the employer has an obligation to reasonably accommodate the individual's religious practices." 29 C.F.R. § 1605.2(c)(1) (emphasis added). In other words, by its plain terms, the regulation contemplates that the employer's duty to provide a reasonable religious accommodation comes after it receives notice from the prospective employee or employee. If no such notice is provided, it would seem to ineluctably follow under the regulation that the employer has no duty to provide a reasonable religious accommodation and cannot (as a matter of law) be held liable for failing to do so.

The agency's compliance manual follows suit and, notably, underscores that the notice provided by the applicant or employee cannot consist of "vague reference[s]," *Johnson*, 762 F.2d at 673, but instead must be specific:

> An applicant or employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it.

EEOC Compliance Manual § 12-IV(A)(1).

To be sure, there is not any particular talismanic litany that the applicant or employee must recite to effectively put the employer on notice. In this regard, the EEOC states, "No 'magic words' are required to place an employer on notice of an applicant's or employee's conflict between religious needs and a work requirement. To request an accommodation, an individual may use plain language and need not mention any particular terms such as 'Title VII'or 'religious accommodation.'" *Id.* But the EEOC does insist that the applicant or employee "provide enough information to make the employer aware that there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job."[12] *Id.*

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[12] Indeed, the EEOC effectively underscores by a hypothetical that an applicant or employee cannot remain silent before the em-

And other policy documents of the EEOC are of similar import, placing the burden on the applicant or the employee to provide notice to the employer of the conflicting religious practice and the need for an accommodation. *See, e.g.*, *EEOC Best Practices*, *supra* (noting that "[e]mployees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules" and they "should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or

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ployer regarding the religious nature of his or her conflicting practice and need for an accommodation and still hope to prevail in a religion-accommodation case:

> **EXAMPLE 29 Failure to Advise Employer That Request Is Due to Religious Practice or Belief**
>
> Jim agreed to take his employer's drug test but was terminated because he refused to sign the accompanying consent form. After his termination, Jim filed a charge alleging that the employer failed to accommodate his religious objection to swearing an oath. Until it received notice of the charge, the employer did not know that Jim's refusal to sign the form was based on his religious beliefs. Because the employer was not notified of the conflict at the time Jim refused to sign the form, or at any time prior to Jim's termination, *it did not have an opportunity to offer to accommodate him*. The employer has not violated Title VII.

EEOC Compliance Manual § 12-IV(A)(1) (emphasis added). In our view, the facts of this hypothetical are closely akin to the facts present here: at no point during her interview with Ms. Cooke (Abercrombie's agent) did Ms. Elauf expressly inform her—directly or indirectly—that she wore her hijab for religious reasons and felt obliged to do so, and, therefore, would need an accommodation. Like the hypothetical employer, Abercrombie did not have a chance to accommodate Ms. Elauf's allegedly religious practice.

belief"); *EEOC Q & A*, *supra* (responding to the question, "[h]ow does an employer learn that accommodation may be needed?" by stating, "[a]n applicant or employee who seeks religious accommodation *must* make the employer aware both of the need for accommodation and that it is being requested due to a conflict between religion and work" (emphasis added)). In sum, the clear, unequivocal guidance reflected in the EEOC's own regulation and policy documents supports our view that the onus is upon the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation.

b

The EEOC intimates that this reading of its regulation and policy documents is too facile. *See* Aplee. Br. at 39 ("These policy documents and regulations do not elevate form over substance and require this Court to take a nonsensical approach to the notice requirement."). In effect, the EEOC contends that the plain language of these materials do not tell the complete story because they do not take into account the circumstances of the instant case—where, in the EEOC's view, the employer had notice from a source other than an explicit communication from the applicant of the need to provide a religious accommodation. *See id.* at 38-39 ("[T]he Commission's policy documents do not address the situation where there is evidence that the employer was aware of the applicant's religious belief without the applicant herself so 'informing' it. As such, none of these policy documents indicates that an employer is excused from its obligation to provide rea-

sonable accommodation for an applicant's religious belief that conflicts with a work requirement simply because someone other than the applicant herself informed the employer of the belief." (quoting EEOC Compliance Manual § 12-IV(A))); *id.* at 39 ("[A]s with the aforementioned policy documents, the regulations do not address the situation where the employer is *otherwise aware* of the individual's religious belief, and accordingly do not preclude a plaintiff from satisfying the notice requirement under such circumstances." (emphasis added)). The EEOC asserts that its reading of the scope of its regulation, 29 C.F.R. § 1605.2(c), is entitled to *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452, 461, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997).

However, we believe that the EEOC's views are unpersuasive and cannot control the outcome here. Notably, we conclude that "there are strong reasons for withholding the deference that *Auer* generally requires." *Christopher v. SmithKline Beecham Corp.*, — U.S. —, 132 S. Ct. 2156, 2167, 183 L. Ed. 2d 153 (2012). "*Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief. " *Id.* at 2166; *see Chase Bank USA, N.A. v. McCoy*, — U.S. —, 131 S. Ct. 871, 880, 178 L. Ed. 2d 716 (2011) ("[W]e defer to an agency's interpretation of its own regulation, advanced in a legal brief. "); *see also Decker v. Nw. Envtl. Def. Ctr.*, — U.S. —, 133 S. Ct. 1326, 1337, 185 L. Ed. 2d 447 (2013) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it. ").

However, "this general rule does not apply in all cases." *Christopher*, 132 S. Ct. at 2166; *see, e.g.*, Harry T. Edwards et al., *Federal Standards of Review*, ch. XIV (Westlaw Database updated Apr. 2013) [hereinafter *Federal Standards*] ("[T]he deference afforded an agency's interpretation of its own regulations is significant, but it is not without limits."). As a threshold matter, in order for *Auer* deference to be warranted, "the language of the regulation in question must be ambiguous, lest a substantively new rule be promulgated under the guise of interpretation." *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002); *see Christensen v. Harris Cnty.*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous. The regulation in this case, however, is not ambiguous. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

Even if that threshold is crossed, there are other circumstances under which the application of *Auer* deference would be unjustified:

> Deference is undoubtedly inappropriate, for example, when the agency's interpretation is plainly erroneous or inconsistent with the regulation. And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question. This might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the

> interpretation is nothing more than a convenient litigating position.

Christopher, 132 S. Ct. at 2166 (citations omitted) (quoting *Auer*, 519 U.S. at 461-62, 117 S. Ct. 905 (internal quotation marks omitted); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) (internal quotation marks omitted)).

In considering the appropriateness of deferring to an agency's interpretation, the *Christopher* Court also highlighted the importance of safeguarding "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" 132 S. Ct. at 2167 (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)); *see Drake*, 291 F.3d at 68 (listing as one of the "preconditions for applying this socalled *Auer* deference" that "the agency's reading of its regulation must be fairly supported by the text of the regulation itself, so as to ensure that *adequate notice* of that interpretation is contained within the rule itself" (emphasis added)); *see Federal Standards*, *supra*, ch. XIV (noting that "in *Christopher* , the Court ruled that no *Auer* deference would be afforded to an agency interpretation of a disputed regulation if the statute, published regulations, and the agency's prior enforcement regime gave no notice to regulated parties of the interpretation proposed by the agency during the course of litigation"). As the *Christopher* Court elaborated:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations

> once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

132 S. Ct. at 2168.

We decline to accord *Auer* deference to the EEOC's interpretation of its own regulation, 29 C.F.R. § 1605.2(c)(1). First, it is far from clear that the regulation is actually ambiguous concerning the central question before us: whether applicants or employees initially must provide express notice to the employer of their conflicting religious practice and their need for an accommodation, in order to trigger the employer's legal duty to provide a reasonable religious accommodation. The regulation's language seems to "plainly" answer yes to that question. *Christensen*, 529 U.S. at 588, 120 S. Ct. 1655; *see id.* ("Nothing in the regulation even arguably requires that an employer's compelled use policy *must* be included in an agreement. The text of the regulation itself indicates that its command is permissive, not mandatory."); *cf. Chase Bank*, 131 S. Ct. at 879-80 (noting that "the key question" was "whether the [interest-rate] increase actually changed a 'term' of the Agreement that was 'required to be disclosed'" within the meaning of the regulation and concluding that the regulation was "ambiguous as to the question presented, and [the Court] must therefore look to [the agency's] own interpretation of the regulation for guidance in deciding this case"). And "if the text of a regulation is unambiguous," as appears to

be the situation here, "a conflicting agency interpretation will necessarily be 'plainly erroneous or inconsistent with the regulation' in question." *Chase Bank*, 131 S. Ct. at 882 (quoting *Auer*, 519 U.S. at 461, 117 S. Ct. 905). Thus, at the threshold, it is doubtful that *Auer* deference to the EEOC's interpretation is appropriate.

Second, even if the regulation were actually "ambiguous in its reach," *Drake*, 291 F.3d at 68, there would be "reason to suspect that the [EEOC's] interpretation does not reflect [its] fair and considered judgment on the matter in question," *Auer*, 519 U.S. at 462, 117 S. Ct. 905. As demonstrated above, through its Compliance Manual and other policy documents, the EEOC has repeatedly, explicitly, and unequivocally indicated that the notice necessary to trigger an employer's duty to provide a reasonable religious accommodation is notice that is initially provided in express terms by applicants and employees. *See, e.g.*, EEOC Compliance Manual § 12-IV(A)(1) ("The employee is obligated *to explain* the religious nature of the belief or practice at issue. '" (emphasis added)); *EEOC Best Practices, supra* (noting that "[e]mployees should advise their supervisors or managers of the nature of the conflict between their religious needs and the work rules" and "should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief"). In other words, on prior occasions, the EEOC has repeatedly taken a position on the notice question that is inconsistent, and conflicts with, the interpretation of that question that it now seeks to engraft onto its regulation.

In such a circumstance, *Auer* deference is "unwarranted." *Christopher*, 132 S. Ct. at 2166; *see id.* (noting that the situation "might occur" where *Auer* deference is unjustified because "the agency's interpretation conflicts with a prior interpretation"); *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994) (noting that "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference' than a consistently held agency view" (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987))); *cf. Bowen*, 488 U.S. at 212-13, 109 S. Ct. 468 (noting that "[f]ar from being a reasoned and *consistent* view of the scope of [the statutory] clause," the agency's "current interpretation is contrary to the narrow view of that provision advocated in past cases"); *Drake*, 291 F.3d at 69 ("Where the agency's litigation position is consistent with its past statements and actions, there is good reason for the court to defer, for then the position seems 'simply to articulate an explanation of longstanding agency practice.'" (quoting *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304 (D.C. Cir. 2000))).

Furthermore, the EEOC does not identify any prior instance where it has taken the stance regarding notice that it does here, and its position does not appear to be anything other than a creature of this proceeding —where it is "a party to this case." *Chase Bank*, 131 S. Ct. at 881. At least coupled with its prior inconsistent conduct, this circumstance gives us some reason to suspect that the EEOC's view regarding notice

is "nothing more than an agency's convenient litigating position"; as such, giving it *Auer* deference "would be entirely inappropriate." *Bowen*, 488 U.S. at 213, 109 S. Ct. 468; *accord Christopher*, 132 S. Ct. at 2166.

Moreover, we have difficulty concluding that the EEOC has provided "adequate notice" (*Drake*, 291 F.3d at 68) or "fair warning" (*Christopher*, 132 S. Ct. at 2167 (quoting *Gates & Fox Co.*, 790 F.2d at 156) (internal quotation marks omitted)) to employers that their obligation to provide a reasonable religious accommodation may be triggered by *something other than* an explicit communication from applicants or employees regarding their conflicting religious practice and need for an accommodation.[13] Nothing in the text of the EEOC's regulation, 29 C.F.R. § 1605.2(c)(1), would "provide clear notice of this." *Christopher*, 132 S. Ct. at 2167. In describing the circumstances under which the employer's obligation to offer a reasonable religious

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[13] This would be especially true to the extent that the EEOC's interpretation of its regulation would permit plaintiffs to establish their prima facie case regarding notice by showing the employer possessed *something less* than actual knowledge of the conflicting religious practice and need for an accommodation—*viz.*, would allow plaintiffs to demonstrate notice by showing some form of employer constructive knowledge, or a "*reasonable indication* to the employer that an accommodation *may* be needed." Aplee. Br. at 34 (emphases added). This is because (as noted *supra*) the EEOC has not identified any judicial decisions supportive of such a position, nor have we uncovered any. *Cf.* Aplt. Reply Br. at 3 n.1 ("[T]he EEOC's regulations nowhere state that a 'reasonable indication' is sufficient to make a *prima facie* case. Employers should be able to rely upon the EEOC's clear pronouncements without having to fear that the EEOC will suddenly 'change its mind' to support whatever argument most benefits its then-current litigation.").

accommodation is triggered, the regulation speaks solely of "an employee or prospective employee notif[ying] the employer [of the need for such an accommodation]." 29 C.F.R. § 1605.2(c)(1). And, as commonly understood, the term "notify" means to "make a usu[ally] formal communication generally about something requiring or worthy of attention." *Webster's Third New Int'l Dictionary* 1160 (2002); *see id.* at 1545 (defining the word "notify" to mean, among other things, to "make known").

In other words, under a natural reading of the regulation, the employer's obligation to provide a reasonable religious accommodation would be triggered only when applicants or employees explicitly inform the employer of their conflicting religious practice and need for an accommodation. Indeed, this natural reading of the regulation is bolstered by the construction canon *expressio unius est exlcusio alterius*—the so-called "negative-implication canon," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012); *see Black's Law Dictionary* 661 (9th ed. 2009) (noting that it is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other"). Specifically, by expressly providing only one means by which an employer's obligation to provide a reasonable religious accommodation may be triggered—explicit notice from an applicant or employee—the regulation may be read to exclude other means by which the "thing to be done," *Christensen*, 120 S. Ct. at 1660 (quoting *Raleigh & Gaston R.R. v. Reid*, 80 U.S. 269, 13 Wall. 269, 270, 20 L. Ed. 570 (1872)) (internal quotation marks omitted), may be accomplished. According-

ly, because the EEOC's broader view of the notice requirement is divorced from the regulation's text and is not congruent with the natural reading of that text, subjecting Abercrombie to it "would result in precisely the kind of 'unfair surprise' against which [the Supreme Court's] cases have long warned." *Christopher*, 132 S. Ct. at 2167 (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71, 127 S. Ct. 2339, 168 L. Ed. 2d 54 (2007)) (internal quotation marks omitted). This is yet another reason why according the EEOC's broader view *Auer* deference would be inappropriate.

Therefore, to the extent that we provide deference at all to the EEOC's broader view, the boundaries of that deference would be defined, not by *Auer*, but rather by the Supreme Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944). *See, e.g., Christopher*, 132 S. Ct. at 2168-69 (turning to the *Skidmore* standard after concluding that "whatever the general merits of *Auer* deference, it is unwarranted here"). Under that decision, to give deference "would be proper only if the [EEOC's view] has the *power to persuade*, which 'depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.'" *Vance v. Ball State Univ.*,— U.S. —, 133 S. Ct. 2434, 2443 n.4, 186 L. Ed. 2d 565 (2013) (second and third alterations in original) (emphasis added) (quoting *Skidmore*, 323 U.S. at 140, 65 S. Ct. 161); *see Christopher*, 132 S. Ct. at 2168-69 (giving the agency's "interpretation a measure of deference proportional to" its satisfaction of *Skidmore*'s criteria). For the reasons that we have noted thus

far—including in this subsection and *supra* in Parts II.C.1-3.a—and that we explicate below in Part II.C.4, we conclude that the EEOC's broader view of the notice requirement is "quite unpersuasive." *Christopher*, 132 S. Ct. at 2169; *see Univ. of Tex. Sw. Med. Ctr. v. Nassar*, — U.S. —, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d 503 (2013) (noting that the EEOC's "explanations lack the persuasive force that is a necessary precondition to deference under Skidmore"); *Vance*, 133 S. Ct. at 2443 n.4 ("For the reasons explained below, we do not find the EEOC Guidance persuasive.").[14]

In sum, notwithstanding the EEOC's objections, we find support in the EEOC's own regulations and policy documents for our view of the notice requirement—which places the onus on the applicant or employee to initially provide explicit notice to the employer of the conflicting religious practice and the need for an accommodation.

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[14] It bears mentioning that insofar as the EEOC's broader view of the notice requirement does not involve concepts akin to constructive notice, but rather is limited to the position that the EEOC's regulation permits plaintiffs to establish their prima facie case regarding notice by showing that the employer possessed *actual knowledge* of the conflicting religious practice and need for an accommodation *from a source other than the applicant or employee*, then even if we were obliged to accord some measure of deference to the EEOC's view, this would not materially alter the outcome that we reach here. That is because (as noted *supra*) there is no genuine dispute of material fact that no Abercrombie agent responsible for, or involved in, the hiring process had actual knowledge—*from any source*—that Ms. Elauf's practice of wearing a hijab stemmed from her religious beliefs and that she needed an accommodation for it.

Finally, as both parties have expressly recognized, the requirement of employers to provide reasonable accommodations for disabled employees under the ADA is analogous to Title VII's requirement that employers provide reasonable religious accommodations; thus, jurisprudence under the ADA can provide guidance as to when an employer's duty to provide a reasonable religious accommodation is triggered under Title VII. *See Thomas*, 225 F.3d at 1155 & nn.5 & 6 (recognizing the similarities between reasonable accommodation requirements in the ADA and Title VII contexts). The ADA's analogous reasonable-accommodation scheme fortifies in at least two ways our belief that our interpretation of the notice requirement in the Title VII religion-accommodation setting is correct.

First, under the ADA, an employer ordinarily has no obligation to engage in the interactive process or provide a reasonable accommodation unless the "employee provid[es] notice to the employer of the employee's disability and any resulting limitations." *Smith*, 180 F.3d at 1171. To provide the employer with notice, the employee "must make an adequate request" for an accommodation. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011). This request must be "sufficiently direct and specific," *id.* (quoting *Calero-Cerezo v. U.S. Dep't of Justice*, 355 F.3d 6, 23 (1st Cir. 2004)) (internal quotation marks omitted), and "make clear that the [employee] wants assistance *for his or her disability*," *id.* (quoting *Colwell v. Rite*

Aid Corp., 602 F.3d 495, 506 (3d Cir. 2010)) (internal quotation marks omitted).

In short, under the ADA, an employer does not have a duty to provide a reasonable accommodation unless one is specifically requested by an employee. *See Koessel v. Sublette Cnty. Sheriff's Dep't*, 717 F.3d 736, 745 (10th Cir. 2013) ("It is not the employer's responsibility to anticipate the employee's needs and affirmatively offer accommodation if the employer is otherwise open to such requests."). Our reading of the notice requirement under Title VII is entirely consistent with this: an employer is only obliged to provide a reasonable religious accommodation to applicants or employees *after* they have explicitly informed the employer of their conflicting religious practice and need for an accommodation for it.

Second, the requirement of specific employee notice under the ADA is logically compatible with the nature of the data necessary to trigger the employer's reasonable-accommodation obligations. "[T]he employer must know of both the disability *and* the employee's desire for accommodations for that disability." *C.R. England*, 644 F.3d at 1049 (emphasis added) (quoting *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 313 (3d Cir. 1999)) (internal quotation marks omitted). Mere awareness of the disability is insufficient because the employer remains unaware that the employee *desires an accommodation* for his or her disability. *See Woodman v. Runyon*, 132 F.3d 1330, 1345 (10th Cir. 1997) ("The 'employee's initial request for an accommodation triggers the employer's obligation to participate in the interactive

process.'" (omission in original) (quoting *Taylor v. Principal Fin. Grp., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996))). Therefore, in order for the employer to gain knowledge of *both* of these facts, ordinarily the employee will need to tell the employer. *See Mole v. Buckhorn Rubber Prods.*, 165 F.3d 1212, 1218 (8th Cir. 1999) ("[An employee] cannot 'expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it.'" (second, third, and fourth alterations in original) (quoting *Ferry v. Roosevelt Bank*, 883 F. Supp. 435, 441 (E.D. Mo. 1995))).

Similarly, our view of the notice requirement is likewise compatible with the nature of the data necessary to trigger an employer's duty to provide a reasonable religious accommodation. Specifically, not only must an employer know that the practice stems from the religious beliefs of the applicant or employee, it must also know that he or she actually *needs* an accommodation for the practice. As suggested by our discussion in Part II.C.2, *supra*, Title VII's conception of the personal and individualized nature of religion and of the interactive accommodation process—under which the employer is affirmatively discouraged from making religious inquiries of applicants or employees in the first instance, or engaging in guess-work or assumptions about their religious beliefs—virtually dictates that applicants or employees must initially communicate the religious nature of the conflicting practice and their need for an accommodation to the employer, in order to trigger the employer's accommodation duty.

In sum, the ADA's reasonable-accommodation jurisprudence supports our interpretation of Title VII. The ADA places the burden on the employee to make the employer aware both of his or her disability and the employee's need for an accommodation for that disability, by adequately communicating this information to the employer in the first instance. *See C.R. England*, 644 F.3d at 1049. Our interpretation of Title VII's notice requirement in the religion-accommodation context is essentially the same. Applicants or employees must initially inform employers of their religious practices that conflict with a work requirement *and* their need for a reasonable accommodation for them. *See Thomas*, 225 F.3d at 1155; EEOC Compliance Manual § 12-IV(A)(1).

III

For the foregoing reasons, we hold that district court should have entered summary judgment in favor of Abercrombie because the EEOC did not satisfy the second element of its prima facie case, as there is no genuine dispute of material fact that Ms. Elauf never informed Abercrombie prior to its hiring decision that her practice of wearing her hijab stemmed from her religious beliefs and that she needed an accommodation for this (inflexible) practice. Accordingly, we **REVERSE** the district court's denial of summary judgment in favor of Abercrombie and likewise, necessarily, **REVERSE** the district court's grant of summary judgment to the EEOC. We **REMAND** the case to the district court with instructions to **VACATE** its judgment and enter judgment in favor of Abercrombie,

and for further proceedings consistent with this opinion.

EBEL, Circuit Judge, concurring in part and dissenting in part.

I concur in the majority opinion's ruling that it was error for the district court to grant summary judgment for Plaintiff-Appellee Equal Employment Opportunity Commission ("EEOC") in this case. However, I dissent in part from the majority's opinion, to the extent that it enters summary judgment for Defendant-Appellant Abercrombie & Fitch Stores, Inc. ("Abercrombie"), because I conclude on this record that a jury should decide whether Abercrombie is liable for religious discrimination.

Title VII prohibits religious discrimination in employment, including an employer's refusal to hire a job applicant because of her religion. 42 U.S.C. § 2000e-2(a)(1). Title VII defines religious discrimination to include an employer's failure to accommodate a job applicant's religious practices, if the employer can reasonably do so without incurring undue hardship to the conduct of its business. *Id.* § 2000e(j); *see Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1154-55 (10th Cir. 2000). Title VII imposes on the employer the duty to reasonably accommodate the religious practices of a job applicant through "an interactive process that requires participation" by both the employer and the applicant. *Thomas*, 225 F.3d at 1155.

The EEOC, on behalf of Samantha Elauf, established a triable claim that Abercrombie discriminated against Elauf on the basis of her religion when Aber-

crombie refused to hire her because of her religious practice of wearing a hijab, or head covering. Specifically, the EEOC set forth evidence from which a jury could find that Abercrombie refused to hire Elauf, without ever informing her that wearing a hijab conflicted with Abercrombie's Look Policy, in order to avoid having to discuss the possibility of reasonably accommodating Elauf's religious practice. If true, that would be religious discrimination proscribed by Title VII. Thus, I would remand this claim for a jury trial.

I. The majority's inflexible requirement that the EEOC must first establish, as part of its prima facie claim, that Elauf informed Abercrombie that its Look Policy conflicted with her religious practice of wearing a hijab makes no sense under the law or the circumstances presented by this case

The majority concludes that an employer's obligation to engage in an interactive dialogue with a job applicant regarding the need for a reasonable accommodation of her religious practice is triggered only when the job applicant herself informs the employer that her religious practice conflicts with a requirement of the job for which she is applying. The majority reaches this conclusion after applying the modified *McDonnell Douglas* burden-shifting framework applicable to failure-to-accommodate claims and holding, at the first step of that analysis, that the EEOC failed to establish a prima facie claim.[1]

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[1] Generally courts addressing a discrimination claim under Title VII apply the burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under that analysis, the plaintiff employee or

In several previous cases *where the existence of a prima facie claim was not disputed*, this court stated the elements of a prima facie failure-to-accommodate claim to be that the plaintiff "(1) had a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed his or her employer of this belief; and (3) he or she was [not hired] for failure to comply with the conflicting employment requirement." *Thomas*, 225 F.3d at 1155 (addressing termination claim); *see also Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1486 (10th Cir. 1989). Applying these elements to this case, the majority rejects the EEOC's failure-to-accommodate claim as a matter of law because Elauf never informed Abercrombie that her religious practice of wearing a hijab conflicted with Abercrombie's Look Policy.

Of course, the reason Elauf never informed Abercrombie of this conflict is that, accepting her evidence

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job applicant must first set forth a prima facie claim of discrimination. *Id.* at 802, 93 S. Ct. 1817. If the plaintiff is able to do so, the employer must then articulate a legitimate, nondiscriminatory reason for taking the challenged employment action. *Id.* Thereafter, the burden shifts back to the plaintiff to show that the employer's proffered reason was really a pretext for discrimination. *Id.* at 804, 93 S. Ct. 1817. In addressing a claim of religious discrimination based upon a failure-to-accommodate theory, however, we apply a modified, two-step *McDonnell Douglas* analysis, asking first whether the plaintiff employee or job applicant established a prima facie failure-to-accommodate claim. *See Thomas*, 225 F.3d at 1155. If so, then the burden shifts to the employer to do one of three things: (1) rebut one or more of the elements of the plaintiff's prima facie case; (2) show it offered the plaintiff a reasonable accommodation; or (3) show it was unable to reasonably accommodate the plaintiff's religious practice without undue hardship. *Id.* at 1156.

as true as we must, Elauf did not know that there was a conflict between her religious practice of wearing a hijab and Abercrombie's Look Policy. However, critically, Abercrombie did know there might be a conflict, because it knew that Elauf wore a headscarf, assumed she was Muslim and that she wore the headscarf for religious reasons, and knew its Look Policy, as ultimately determined by Randall Johnson, the person who made the decision not to hire Elauf, prohibited its sales models from donning headwear. Based on these assumptions, and without ever informing Elauf that Johnson ultimately determined that the hijab would not be allowed, Abercrombie refused to hire her because she wore a hijab. In this way, Abercrombie was able to avoid any interactive dialogue with Elauf about whether Abercrombie could reasonably accommodate Elauf's religious practice.

Under these circumstances, it makes no sense to apply, reflexively and inflexibly, the second element of the ordinary prima facie failure-to-accommodate claim to require Elauf to show first that she informed Abercrombie that her religious practice conflicted with Abercrombie's Look Policy, when that policy's proscription against wearing a headscarf at work had never been disclosed to her. Nor are we bound, as the majority suggests, to apply the elements of a prima facie failure-to-accommodate claim as set forth in prior, factually distinct cases that did not raise or resolve the issue before us of whether it is the applicant's burden in the first instance to request a religious accommodation to an *undisclosed* employer's policy.

I conclude we are not bound here to apply this court's prior rendition of the elements of a prima facie failure-to-accommodate claim, for several reasons.

First and foremost, the specific elements of a prima facie claim must be flexible, in order to address the specific circumstances presented by a given case. The Supreme Court stressed this when it first set forth the *McDonnell Douglas* analytical framework. *McDonnell Douglas*, 411 U.S. at 802 n.13, 93 S. Ct. 1817 (noting that "[t]he facts necessarily will vary in Title VII cases, and the specification [in *McDonnell Douglas*] of the prima facie proof required from [the plaintiff] is not necessarily applicable in every respect to differing factual situations"). This court has, on numerous occasions, recognized the need to modify the elements of a prima facie discrimination claim to fit the facts of a given case. *See Stover v. Martinez*, 382 F.3d 1064, 1077 (10th Cir. 2004) (noting *McDonnell Douglas* framework, as "modified to reflect the particular factual situation at hand," applied to Title VII religious discrimination claims); *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036-38 (10th Cir. 1993) (declining to apply prima facie elements of a failure-to-accommodate claim to a cause of action alleging that the employer fired the plaintiff employee because the employee did not share his supervisors' religious beliefs; applying, instead, a modified version of the elements of a straightforward prima facie discrimination claim).[2] "The *prima facie* case method established in

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[2] *See also, e.g., Garrison v. Gambro, Inc.*, 428 F.3d 933, 937 (10th Cir. 2005); *Plotke v. White*, 405 F.3d 1092, 1099-1100 (10th Cir. 2005); *Mattioda v. White*, 323 F.3d 1288, 1291-93 (10th Cir. 2003); *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1164 (10th Cir. 2002); *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 559-60 (10th Cir. 1996); *Randle v. City of Aurora*, 69 F.3d 441, 451 n.13 (10th Cir. 1995); *Lucas v. Dover Corp.*, 857 F.2d 1397, 1400-01 (10th Cir. 1988); *Crawford v. Ne. Okla. State Univ.*, 713 F.2d 586, 588 (10th Cir. 1983).

McDonnell Douglas was 'never intended to be rigid, mechanized, or ritualistic.'" *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) (quoting *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978)).

> The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) (rejecting, in pattern-or-practice case, argument that "the McDonnell Douglas pattern [w]as the only means of establishing a prima facie case of individual discrimination").

Second, the plaintiff's burden of presenting a prima facie discrimination claim under Title VII is not meant to be onerous. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("The burden of establishing a prima facie case" of disparate treatment is not onerous.); *see also Shapolia*, 992 F.2d at 1038 (noting burden of establishing prima facie religious discrimination claim is not onerous). Here, the majority not only made this initial burden onerous, but also made it preclusive of a claim for relief.

Third, the purpose of the *McDonnell Douglas* burden-shifting framework, of which the prima facie

claim is a part, is different in the context of a failure-to-accommodate claim than it is for a Title VII claim alleging discrimination generally. *See Thomas*, 225 F.3d at 1155 n.6. In a straight discrimination claim, the prima facie claim serves the purpose of probing whether the employer intended to discriminate. *See id.*; *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 n.12 (10th Cir. 1999) (reh'g en banc). The purpose of applying a modified version of the *McDonnell Douglas* burden-shifting analysis in the context of an accommodation case, on the other hand, is "simply to provide a useful structure by which the district court, when considering a motion for summary judgment, can determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered." *Thomas*, 225 F.3d at 1155 n.6 (quoting *Smith*, 180 F.3d at 1178 n.12). So, if the plaintiff asserts evidence which, if believed, would establish the employer's liability for failing to accommodate a job applicant's religious practices, then the plaintiff has established a prima facie failure-to-accommodate claim. As explained below, the EEOC has met that less-than-onerous burden here.

Before addressing how the EEOC has established a prima facie failure-to-accommodate claim in this case, however, I would stop to note that I agree with the majority that, in the ordinary case, it is the job applicant who must inform the employer that she has a religious belief that conflicts with the requirements of the job for which she is applying. This makes sense, of course, because generally it will be the job applicant who will have superior knowledge of that

conflict. It is the job applicant who knows of her religious beliefs and practices. When she becomes aware that a requirement of the job for which she is applying conflicts with her beliefs, the onus is on the job applicant to inform the employer of this conflict and the need for any accommodation. Under such circumstances, the employer has no obligation to participate in the interactive process of exploring the possibility of a reasonable accommodation until the employer knows of the conflict.[3] *See E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir. 2011) (Americans with Disabilities Act case).[4] Therefore, I do not doubt that our generalized rendition of the

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[3] It may also be the case in some situations that neither the employer nor the job applicant will know that there is a conflict between the job's requirements and the applicant's religious practices, because the employer will be aware of its work rules and the applicant will know her religious beliefs, but neither side will inform the other of these matters during the course of a job interview. Under such circumstances, no dialogue will occur between the job applicant and the employer as to this unidentified conflict, through no fault of either party. In that scenario, the employer would not be liable for failure to accommodate. However, here the facts are sufficient to permit (though not compel) a jury to find that Abercrombie did know, or thought it knew, of Elauf's religious beliefs and subverted the interactive process by declining to pursue her employment application without discussing the possibility of an accommodation with her. Thus, it is error, in my opinion, to grant summary judgment to Abercrombie on this record.

[4] Because both the Americans with Disabilities Act and Title VII's proscription against religious discrimination impose an affirmative obligation on employers to make reasonable accommodation, the Tenth Circuit applies case law addressing both statutes when considering issues surrounding reasonable accommodation. *See Thomas*, 225 F.3d at 1155 & n.5; *see also* Maj. Op. at 1122-23, 1141-43.

elements of a prima facie failure-to-accommodate claim, which require the plaintiff to show that she informed the employer of a conflict between her religious practices and the job requirements, will still apply to most failure-to-accommodate claims. But that does not mean that we must force all failure-to-accommodate claims into this prima facie mold when it makes no sense to do so under the particular facts of a given case. And that is the situation here, where, based on the EEOC's evidence, it was Abercrombie with superior knowledge of the conflict between its Look Policy and Elauf's apparent religious practice, a conflict of which Elauf was unaware.

For the reasons that follow, then, I disagree with the majority's approach in this case of requiring the EEOC, in order to state a prima facie claim, to show that Elauf informed Abercrombie that her religious practice of wearing a hijab conflicted with Abercrombie's Look Policy, the relevant provisions of which Elauf was unaware.

II. The EEOC established a prima facie claim that Abercrombie failed to accommodate Elauf's religious practice of wearing a hijab

In order to survive summary judgment, the EEOC had to establish a prima facie claim by asserting evidence that, if believed, would support Abercrombie's liability for failing to accommodate Elauf's religious practice of wearing a hijab. *See Thomas*, 225 F.3d at 1155 n.6. I conclude the EEOC met that less-than-onerous burden by showing four things: (1) Elauf had a bona fide religious belief that conflicts with Abercrombie's Look Policy; (2) she was not aware of Abercrombie's conflicting policy; (3) but Abercrombie had

knowledge that Elauf might hold religious beliefs that conflicted with its Look Policy; and (4) without informing Elauf of the provisions of its Look Policy that might conflict with her religious beliefs, Abercrombie instead refused to hire Elauf *because of* that possible conflict.

As to the first element, the district court held that the EEOC established, as a matter of law, that Elauf held a bona fide religious belief that she must wear a hijab in public. Although Abercrombie challenged that determination on appeal, I would affirm the district court's decision in that regard.

As to the second element, that Elauf was not aware that Abercrombie's Look Policy conflicted with her religious practice of wearing a hijab, it is undisputed that Abercrombie's managers never informed Elauf that the Look Policy prohibited headscarves.[5] (Aplt. App. at 299; Aple. Supp. App. at 49.) Further, there was evidence that, before she applied for a job with Abercrombie, Elauf, through a friend, inquired of one of Abercrombie's store managers whether there was a problem with her wearing a hijab while working in an Abercrombie store and was told that it would be no problem so long as the hijab was not black.[6] (Aplt. App. at 50-52, 393.)

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[5] Three of the four Abercrombie managers involved here interpreted the Look Policy to permit headscarves, so long as they were not black in color. (Aplt. App. at 393; Aple. Supp. App. at 49, 51; Maj. op. at 1113-14.) There is evidence that this would have been an acceptable accommodation of Elauf's religious beliefs. (Aplt. App. at 52.)

[6] The majority contends that this evidence does not establish that Elauf expressly informed Abercrombie of her religious prac-

As to the third element of the EEOC's prima facie claim, that Abercrombie had knowledge that Elauf might hold religious beliefs that conflicted with its Look Policy, it is undisputed that Heather Cooke, the Abercrombie assistant store manager who interviewed Elauf, "assumed that [Elauf] was Muslim," (*id.* at 307), assumed that Elauf wore a hijab for "religious reasons," (*id.*), and assumed that Elauf would wear a hijab while working in an Abercrombie store. (*Id.* at 306-07; Aple. Supp. App. at 48.)

The EEOC's showing of the second and third elements—that Elauf was unaware that her religious practice of wearing a hijab conflicted with the Look Policy, but that Abercrombie was aware there might be such a conflict—establishes circumstances that justify applying here a common sense exception to the usual rule that, in order to trigger an employer's duty to participate in the interactive dialogue regarding reasonable accommodation, the job applicant must first inform the employer that she holds religious beliefs that conflict with the job's requirements. Recognizing such a common sense exception under these

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tice of wearing a hijab and expressly sought an accommodation for that practice. I agree. But this evidence is relevant to show Elauf's state of mind, that when she interviewed for a position with Abercrombie, she did not think that the Look Policy prevented her from wearing a hijab at work. Moreover, it seems reasonable for a job applicant to check with an employer (here, the employer's representative, an assistant store manager) as to the requirements for the job and to rely upon that information unless told differently in her interview. Further, this evidence arguably suggests that Abercrombie affirmatively misled Elauf into believing that there was no problem with her wearing a hijab while working in one of Abercrombie's stores, which may explain why she did not raise the issue during her job interview.

circumstances is consistent with cases generally recognizing similar exceptions. For example, in the context of an employer's reasonable accommodation of disabilities under the Americans with Disabilities Act ("ADA"), we require, as a precondition to suit, that the employee have requested an accommodation "*unless* the employer has foreclosed the interactive process through its policies or explicit actions." *Koessel v. Sublette Cnty. Sheriff's Dep't*, 717 F.3d 736, 744 (10th Cir. 2013) (emphasis added) (internal quotation marks omitted). And the Ninth Circuit, again under the ADA, has recognized an exception to the requirement that the employee request an accommodation for his disability, under circumstances where the employer knows that the employee has a disability, knows that the employee is having trouble at work due to his disability, and knows, or has reason to know, that the disability prevents the employee from requesting an accommodation. *See Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1188 (9th Cir. 2001). There are, then, exceptions to the general rule that an employer's obligation to consider a reasonable accommodation is not triggered unless and until an employee or job applicant informs the employer of the need for an accommodation.

Even more directly analogous to the situation here, other circuits have held that a job applicant or employee can establish a prima facie religious failure-to-accommodate claim if she can show that the employer knew of a conflict between the plaintiff's religious beliefs and a job requirement, regardless of how the em-

ployer acquired knowledge of that conflict.[7] These cases conclude that "[a]n employer need have 'only

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[7] *See Dixon v. Hallmark Cos.*, 627 F.3d 849, 855-56 (11th Cir. 2010) (rejecting argument that plaintiff employees who operated a property management office had failed to assert a prima facie failure-to-accommodate claim because they did not inform the employer of their specific belief that God should not be removed from public places, where there was ample evidence that their supervisor was already aware that there was a tension between the plaintiffs' religious beliefs and the employer's policy against displaying religious artwork in the employer's property management offices); *Brown v. Polk Cnty.*, 61 F.3d 650, 652-53 (8th Cir. 1995) (rejecting employer's argument that employee never explicitly requested an accommodation of his religious activities because employer was already aware of "the potential for conflict" between the employee's religious activities and the employer's work rules because the employee had previously been reprimanded for his religious activities at work); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1361-63 (S.D. Fla. 1999) (holding orthodox Jew who applied for pharmacist position and whose religious beliefs precluded his selling condoms, stated at least a prima facie failure-to-accommodate claim even though the employer discovered this conflict between the applicant's religious beliefs and the job requirements, not from the applicant, but from one of the applicant's job references; noting that "[i]t would be hyper-technical, based on the facts of this case, to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff. The notice requirement is meant in part to allow the company an opportunity to attempt to reasonably accommodate the Plaintiff's beliefs. The [employer] was not deprived of the opportunity to attempt to accommodate the Plaintiff's beliefs merely because the notice did not come from the Plaintiff."); *see also Heller v. EBB Auto Co.*, 8 F.3d 1433, 1436-37, 1439 (9th Cir. 1993) (in addressing claim that car dealership fired one of its salesmen for missing work to attend a ceremony for his wife's conversion to Judaism, rejecting argument that the salesman failed to state a prima facie failure-to-accommodate claim because he did not explain the ceremony sufficiently to his employer; concluding that "[a] sensible approach would require only enough information about an employee's religious needs to permit

enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements.'" *Brown*, 61 F.3d at 654 (8th Cir.) (quoting *Heller*, 8 F.3d at 1439 (9th Cir.)). I would rely on this principle here. To my mind, once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices. At that point, the need for accommodation has been put on the table for discussion and the employer, with superior knowledge of its ability to accommodate, can no longer ignore the need to initiate dialogue with the employee regarding reasonable accommodations.

Thus, where, as here, the employer has knowledge of a credible potential conflict between its policies and the job applicant's religious practices, the employer has a duty to inquire into this potential conflict. This duty does not, however, obligate the employer to inquire, open-endedly, about the applicant's religious beliefs and practices. Under the circumstances presented here, Abercrombie only had a duty to disclose to Elauf that its Look Policy prohibited Elauf from wearing any headwear while working in one of Abercrombie's stores, when it had notice of facts that suggested to it the possibility of such a conflict. This inquiry would have been sufficient to initiate any needed dialogue between the job applicant, Elauf, and the em-

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the employer to understand the existence of a conflict between the employee's religious needs and the employer's job requirements").

ployer, Abercrombie, as to whether Elauf had religious beliefs that conflicted with Abercrombie's dress code, beliefs which perhaps would be addressed by an accommodation.[8]

The majority disagrees with the cases from these other circuits (thereby creating a conflict among the circuits) which permit a plaintiff to establish a prima facie failure-to-accommodate claim by establishing that the employer knew, by any means, of a conflict between the plaintiff's religious practices and the employer's work rules. I would follow the holdings in those case but, even without relying on those cases here, the EEOC has still put forth evidence establishing the fourth element of her prima facie claim, that Abercrombie assumed that Elauf was Muslim, that she wore a hijab for religious reasons, and that she would insist on wearing a hijab while working in an Abercrombie store, and then, based on those assumptions and without first initiating any dialogue with Elauf to verify its assumptions, Abercrombie refused to hire Elauf because she wore a hijab. (Aplt. App. at 306-07; Aple. Supp. App. at 48, 51.)

Those facts, if found by a jury, smack of exactly the religious discrimination that Title VII prohibits. And

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[8] This duty is not unlike the duties of inquiry recognized by the law in other contexts, when facts are sufficient to put a party on notice he needs to make inquiry or be held to know the facts which such inquiry would have uncovered. *See TRW Inc. v. Andrews*, 534 U.S. 19, 30, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (in parenthetical to citation for *Stone v. Williams*, 970 F.2d 1043, 1049 (2d Cir. 1992); addressing when statute of limitations begins to run); *see also Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1201-02 (10th Cir. 1998) (addressing when statute of limitations for private securities fraud action began to run).

a jury could further find, from such facts, that Abercrombie, based on its superior knowledge of a possible conflict between Elauf's religious practice and Abercrombie's Look Policy, was able affirmatively to avoid its obligation to engage in an interactive dialogue with Elauf about a reasonable accommodation of Elauf's religious practice by not mentioning the possible conflict and then not hiring her because of it. *See Bartee v. Michelin N. Am., Inc.*, 374 F.3d 906, 916 (10th Cir. 2004) (noting, in ADA case, that employer's refusal to participate in an interactive process could result in liability); *Albert v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1253 (10th Cir. 2004) (noting, in an ADA case, that "[n]either party may create or destroy liability by causing a breakdown of the interactive process").[9] On the record in this particular case, a jury could find Abercrombie liable for violating Title VII's proscription against religious discrimination in employment on this basis. The EEOC, therefore, has established a prima facie failure-to-accommodate claim.

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[9] Other circuits have noted, in addressing this interactive process in the context of reasonable accommodation under the ADA, that an employer can be liable for refusing to participate in good faith in that process:

> [C]ourts should look for signs of failure to participate in good faith or failure by one of the parties to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, *by way of initiation or response*, may also be acting in bad faith. In essence, courts should attempt to isolate the cause of the breakdown and then assign responsibility.

Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 312 (3d Cir. 1999) (emphasis added) (quoting *Bultemeyer v. Fort Wayne Cmty. Sch.*, 100 F.3d 1281, 1285 (7th Cir. 1996)).

In conclusion, let me be very clear. I am not suggesting that the employer has a general duty, during a job interview, to give the applicant a comprehensive "laundry list" of all of the employer's work policies in order to determine if those job requirements might possibly conflict with an applicant's unstated religious beliefs or practices. I agree that the burden ordinarily remains with the job applicant to inform the employer of any conflict between the job's requirements and her religious beliefs and practices, because it will usually be the applicant, and not the employer, who knows of such a conflict. However, I am also not suggesting, as the majority appears to be, that a job applicant must initiate a general discussion of her religious beliefs during the job interview just in case her religious beliefs and practices might conflict with some unstated policy or work rule of the employer. The EEOC has shown here that it was the employer, Abercrombie, which had superior knowledge of a possible conflict between its Look Policy and Elauf's apparent religious practice of wearing a hijab. Under those facts, established after viewing the evidence in light most favorable to the EEOC,[10] Abercrombie had

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[10] The facts presented here include the fact that Elauf wore a black hijab to her interview (Aplt. App. at 368), exhibiting the very practice that Abercrombie's Look Policy was ultimately determined to forbid. Further, Abercrombie assumed that Elauf was Muslim, wore the hijab for religious reasons, and would insist on wearing a hijab while working in one of Abercrombie's stores. (*Id.* at 306-07; Aple. Supp. App. at 48.) Abercrombie then acted on those assumptions, without first verifying them with Elauf, when it decided not to hire her. (Aple. Supp. App. at 48, 51.) So this is not a case where the employer can claim to have been blindsided by some objectionable practice of the job applicant that the employer did not realize was religiously based.

a duty to initiate a dialogue with Elauf by informing her that Abercrombie's Look Policy prohibited its sales models from wearing headwear and then inquiring whether she could comply with that policy, or whether Abercrombie could accommodate her belief in some reasonable way. Said another way, a jury could find Abercrombie liable under Title VII for assuming that Elauf was a Muslim who wore a hijab for religious reasons and that she would insist on wearing a hijab while working in one of Abercrombie's stores, and then, without initiating a dialogue with Elauf to verify those assumptions, refused to hire Elauf based upon the company's assumptions.[11]

III. Because Abercrombie's evidence contradicted the EEOC's prima facie evidence, that created a triable issue of fact as to whether Abercrombie failed to accommodate Elauf's religious practice of wearing a hijab; therefore, a jury trial is required

The district court entered summary judgment for the EEOC. The majority reverses that determination and concludes that summary judgment should enter, instead, for Abercrombie. I agree that the EEOC is not entitled to summary judgment because there is conflicting evidence on both sides. However, for the same reason, I dissent from the entry of summary judgment on behalf of Abercrombie. I would, instead, remand for a jury trial because there are factual disputes as to whether the circumstances presented here triggered Abercrombie's duty to initiate an interactive dialogue with Elauf in order to determine whether she

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[11] All of the above could reasonably be inferred from the record in this case, read in the light most favorable to the EEOC on behalf of Elauf.

had a religious practice that conflicted with Abercrombie's Look Policy. In light of these factual disputes, a jury must decide the EEOC's failure-to-accommodate claim asserted on Elauf's behalf. Therefore, I would remand that claim for trial.[12]

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[12] The district court granted the EEOC summary judgment on an alternative basis, holding as a matter of law that Abercrombie had failed to establish that it could not accommodate Elauf's religious practice of wearing a hijab without suffering undue hardship to the conduct of its business. Abercrombie challenges that determination on appeal. Because I conclude there is conflicting evidence as to that issue, as well, I would not affirm the district court's decision to grant summary judgment for the EEOC on that basis.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 09-CV-602-GKF-FHM
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS, DEFENDANT

Filed: July 13, 2011

OPINION AND ORDER

GREGORY K. FRIZZELL, District Judge.

This matter is before the court on the Motion for Summary Judgment of defendant Abercrombie & Fitch Stores, Inc. ("Abercrombie") [Dkt. # 50] and the Amended Motion for Partial Summary Judgment of plaintiff, the Equal Employment Opportunity Commission ("EEOC") [Dkt. # 68].

The EEOC brought this action pursuant to Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(f)(1) & (3)) and Title I of the Civil Rights Act of 1991 (42 U.S.C. § 1981a), alleging religious discrimination against Samantha Elauf ("Elauf"), a Muslim teenager who applied for a job at an Abercrombie store in

Woodland Hills Mall in 2008. [Dkt. # 2]. Abercrombie did not hire Elauf because, as a Muslim, she wears a head scarf and the Abercrombie "Look Policy" prohibits sales models from wearing head wear.

The EEOC seeks summary judgment on the issue of liability or, in the alternative, on one or more elements of its prima facie case and/or on Abercrombie's affirmative defense of undue hardship. Abercrombie contends the EEOC's motion should be denied and its cross motion should be granted because the EEOC has not established a prima facie case, and because an accommodation for Elauf would cause Abercrombie undue hardship.

I. Material Facts

Abercrombie operates retail stores across the country under a variety of brand names, including Abercrombie & Fitch, abercrombie ("Abercrombie Kids") and Hollister. [Dkt. # 86, Defendant's Statement of Facts ¶ 1; Dkt. # 77, Plaintiff's Response to Defendant's Statement of Facts ¶ 1]. The target customer of Abercrombie & Fitch is age 18 to 22 and the target customer of Abercrombie Kids is age 8 to 16. [Dkt. # 50, Supplemented Written Testimony of Dr. Erich A. Joachimsthaler, ¶ 26]. Abercrombie's Vice President of Human Resources, Deon Riley, testified that its largest advertising is its "in store experience with our models (sales associates), the look and feel of the store, what the customer has come to expect." [Dkt. # 86, Ex. 3, Deon Riley Dep., 19:1-5].

In 2008, Abercrombie operated an Abercrombie Kids store in the Woodland Hills Mall in Tulsa, Oklahoma. [Dkt. # 68, Plaintiff's Statement of Facts ¶ 7]. At all times from 2005 to the present, Abercrombie

has required employees in its Abercrombie Kids, Abercrombie & Fitch, and Hollister stores to comply with a "Look Policy." [# 68, Ex. 3, Chad Moorefield Dep., 69:7-17, 102:23-103:16, 149:20-167:5 and Moorefield Dep. Exs. 7, 8, 9; Ex. 7, Riley Dep. 18:5-17]. Kathleen Lundquist, an expert for Abercrombie, has stated that the Look Policy is inherent to a model's role and is a major component of the in-store experience. [# 50, Ex. G, Lundquist Declaration, ¶ 8]. The Look Policy requires employees to dress in clothing and merchandise consistent with that sold in the store; requires that male employees be clean shaven; prohibits female employees from wearing necklaces and bracelets; requires employees to wear specific types of shoes; and prohibits "caps" but does not mention any other head wear. [Dkt. # 68, Ex. 4, Heather Cooke Dep., Ex. 8 thereto, pp. 29-30]. The policy applies to all store employees, but applicants are not required to be in compliance at the time of the interview. [Dkt. # 50, Ex. C, Riley Dep., 63:18-24].

Abercrombie trains store managers "never to assume anything about anyone" in a job interview, and not to ask applicants about their religion. [Dkt. # 68, Ex. 7, Riley Dep., 62:18-63:3]. If there are issues or questions regarding the Look Policy or an employee requests a religious accommodation, the store manager is instructed to contact Abercrombie's Human Resources Department and/or their direct supervisor. [Dkt. # 50, Ex. C., Riley Dep., 32:10-21, 113:2-114:7]. The Human Resources managers have the individual discretion to grant accommodations "as long as it's not going to distract from the brand." [*Id.*, 114:2-7].

Samantha Elauf has been a Muslim since birth. [Dkt. # 68, Ex. 2, Elauf Dep., 28:18-20]. Her parents

are both practicing Muslims. [*Id.*, 29:6-8]. Her mother wears a head scarf on a daily basis [*Id.*, 30:23-31:10], and Elauf began to wear a head scarf[1] at age 13. [*Id.*, 31:14-16]. Since then, she has worn a head scarf at all times when in public or in the presence of male strangers. [*Id.* 32:7-33:5]. She considers it a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty. [*Id.*, 32:2-6;121:22-24; 123:10-21]. She testified that the head scarf becomes an obligation after one reaches puberty, and "that's the only time you'll be able to decide whether or not you want to wear a head scarf." [*Id.*, 34:3-10].

Elauf acknowledged the Quran does not explicitly require women to wear head scarves. [*Id.*, 124:16-25; Ex. 50, Ex. A, Elauf Dep., 125:1-4]. She admitted that someone could be an observant Muslim without wearing a head scarf, and testified that several members of her family, and her friend Farisa Sepahvand, do not wear head scarves, but she does not think they are looked down upon or are not "good Muslims." [*Id.*, 30:8-11; 35:10-21; 45:1-20; 121:2-17].

Elauf fasts during Ramadan and has done so since she was in fifth grade. [*Id.*, 40:21-41:13]. She does not pray five times a day[2] or daily, but prays and reads

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[1] A head scarf is a type of hijab, a head covering common in Islamic cultures. [Dkt. # 68, Ex. 1, John Esposito Dep., 44:1-20]. There are different styles of hijabs. [*Id.*, 47:8-15]. Elauf wears one that does not appear to cover her face, neck or shoulders. [# 68, Ex. 4, Cooke Dep., Exs. 6 and 7 thereto; Ex. 1, Esposito Dep., 47:19-48:4].

[2] Elauf testified that part of the Muslim religion is to pray five times a day. [Dkt. # 68, Elauf Dep., 42:6-16].

verses of the Quran twice a month and also studies the Quran during Ramadan. [*Id.*, 38:12-39:16]. She does not drink, party or gamble, as they are considered "not Islamic." [*Id.*, 38:5-10]. She tries to cover the majority of her arms and legs when she dresses. [*Id.*, 48:6-20].

Elauf "occasionally" attends services at her mosque,[3] the Islamic Center in Tulsa, but said she is not sure where it is located as far as the street name. [Dkt. # 86, Ex. 1, Elauf Dep., 13:2-6].

Elauf's Application and Interview

On June 25, 2008 Elauf, then 17, applied for a job as a model at the Abercrombie Kids store in Woodland Hills Mall. [Dkt. # 68, Ex. 2, Samantha Elauf Dep., 52:4-53:7]. Assistant store manager Heather Cooke interviewed her on June 26, 2008. [*Id.*, Ex. 4, Heather Cooke Dep., Ex. 5 thereto].

As a high school student, Elauf had worked at Woodland Hills Mall in the Fruit Fondue kiosk and the Limited Too store. [Dkt. # 68, Ex. 2, Samantha Elauf Dep., 44:3-17; 54:6-17]. Before she applied for a job at Abercrombie, she had shopped there and bought jeans, sweatshirts, tank tops and t-shirts from its stores. [*Id.*, 49:8-18]. Elauf's friend, Farisa Sepahvand, who worked as a model at Abercrombie

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[3] She estimates she attends two of the weekly Friday prayer services plus two holiday services each year provided she is not working, i.e., four services a year. She testified that it is "not [as] necessary for a woman to go to the Friday prayers as it is for a man." [Dkt. # 86, Ex. 1, Samantha Elauf Dep., 13:25-14:10, 15:5-24].

Kids, encouraged her to apply. [*Id.*, 45:23-46:1;]. Like Elauf, Sepahvand is a Muslim. [*Id.*, 12:12-13].

Elauf was unaware, before she applied, that Abercrombie had a Look Policy. [*Id.*, 59:6-11]. Elauf testified that Sepahvand told her she had discussed with Cooke whether it was okay if Elauf wore a black head scarf, and Cooke said she would probably have to wear a different color. [*Id.*, 57: 7-58:2]. Sepahvand told Elauf she would not be able to wear a head scarf that was black because Abercrombie required models to wear clothing similar to what it sold, and Abercrombie did not sell black clothing. [*Id.*, 56:17-57:12; Ex. 17, Farisa Sepahvand Dep., 32:24-33:24]. Elauf testified she knew Abercrombie does not sell head scarves, although it sold scarves she could wear as head scarves. [# 86, Defendant's Statement of Fact ¶ 5 and Ex. 1, Elauf Dep., 117:4-15].

Elauf testified that during the interview, Cooke never mentioned the Look Policy, but told her she would "wear clothing that either looked like Abercrombie and then the fact that I wasn't supposed to wear heavy makeup or like polish, nail polish." [Dkt. # 86, Ex. 1, Elauf Dep., 65:2-8]. It is undisputed that Cooke did not tell her Abercrombie would not permit models to wear head scarves or to wear black clothing. [*Id.*, 65:15-21; # 68, Ex. 4, Cooke Dep. 98:14-99:1].[4]

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[4] The witnesses' testimony on this subject conflicts to some extent. Elauf was "pretty sure" Cooke told her that "what I was wearing that day would be fine but I would just have to wear a different color scarf because I think I was wearing a black scarf and I was wearing black sandals, and you weren't allowed to wear black shoes . " [*Id.*, Ex. 2, Elauf Dep., 61:23-62:13]. Cooke testified she did not discuss with Elauf the fact that she wore a head scarf

Cooke was responsible for recruiting, interviewing, and hiring new store employees. She supervised models in the store, had the authority to discipline them, and decided which model applicants would receive job offers. She did not usually seek approval from the District Manager before extending a job offer, and the District Manager was usually not involved in deciding whether to hire a specific applicant. [Dkt. # 68, Ex. 4, Cooke Dep., 23:3-16, 27:8-30:18, Ex. 5, Johnson Dep. 34:9-25, 38:17-25; Ex. 3 Moorefield Dep. 141:22-142:6; Ex. 6 Def. Responses to Pl. First Interrogatories, No. 9.].

During the interview with Cooke, Elauf wore an Abercrombie & Fitch like T-shirt and jeans, and a head scarf. [Dkt. # 68, Ex. 4, Cooke Dep., 95:12-96:3; 109:1-8]. Cooke had previously seen Elauf wearing a head scarf in the Woodland Hills Mall. [*Id.*, 96:5-10]. Cooke testified that the head scarf signified to her that Elauf was Muslim and, "I figured that was the religious reason why she wore her head scarf, she was Muslim," [*Id.*, 96:11-15] and "I just assumed that she was Muslim because of the head scarf was for religious reasons." [*Id.*, 153:19-22]. Cooke believed Elauf was a good candidate for the job, but she was unsure, at the time, whether it would be a problem for Elauf to wear the headscarf to work as a model for Abercrombie. [*Id.*, 99:6-16; 109:9-11]. She testified:

> Q: Did you, at that time, feel that she should not be able to work as a model at Abercrombie Kids because she was wearing the head scarf?

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during the interview or tell her should could not wear black if she was hired as a model. [# 68, Ex. 4, Cooke Dep., 98:14-99:1].

A: No. I did not feel. I felt like she could. I didn't feel like there was anything wrong with it. But I knew that in—not in this, but in the Employee Handbook, it does say that we're not supposed to wear the color black. But they had just said we could wear black converse tennis shoes. So I was a little unclear.

And I think it says in the handbook you can't wear hats. So I was unclear. So that's why—I was the assistant manager and that's why I asked the store manager and the district manager.

[*Id.*, 99:17-100:9].

The store manager was unable to answer Cooke's question about head scarves, so she consulted with her District Manager, Randall Johnson. [*Id.*, 106:24-107:8]. She testified Johnson told her not to hire Elauf because she wore the head scarf, that employees were not allowed to wear hats at work, and that if Elauf wore the head scarf, then other associates would think they could wear hats at work. [*Id.*, 107:8-12]. Cooke further testified:

Q: And did you—did you discuss it with him in sort of—did you have any discussion with him over this?

A: Yes, I did. I thought she was a very good candidate to work here. And I asked him, you know, she wears the head scarf for religious reasons, I believe. And he said, "You still can't hire her because someone can come in and paint themselves green and say they were doing it for religious reasons, and we can't hire them.

> And I told him that I believed that she was Muslim, and that was a recognized religion. And that she was wearing it for religious reasons. And I believe that we should hire her.
>
> Q: And what did he say?
>
> A: He told me not to hire her.

[*Id.*, 107:14-108:5].

In his deposition, Johnson denied Cooke told him Elauf wore the head scarf for religious reasons and also denied making the remark about people painting themselves green. [Dkt. # 68, Ex. 5, Randall Johnson Dep., 86:4-21].

Johnson testified that Abercrombie's Human Resources Department is responsible for compliance with the Look Policy, and if he had a question whether a head scarf was the same as a cap, he would have called his HR manager. [*Id.*, 48:24-49:10]. However, he believed the head scarf would not have complied with the Look Policy. [*Id.*, 48:20-23]. He testified that during the time he was district manager, the Abercrombie Kids store had never had any exception to the Look policy. [*Id.*, 69:15-21]. He was not aware Abercrombie allowed any exceptions nationwide from 2001 to 2009. [*Id.*, 70:25-71:12]. He was unaware that in other stores, Abercrombie had allowed store models to wear a yarmulke. [*Id.*, 71:9-12]. In his opinion, there was no difference between a yarmulke, a head scarf, "[o]r a ball cap or a helmet for all that matters. It's still a cap," and if an applicant asked to wear a ball cap for religious reasons, he "[s]till would have denied them, yes, sir." [*Id.*, 71:13-72:3].

Johnson testified that the process for considering a request for an exception would be that he would contact his HR director, "and they would make that exception or determination if we could hire them or go forward with that applicant." [*Id.*, 72:4-14]. He stated that he had "never had to make an exception, no, or make-or call HR to make an exception." [*Id.*, 72:15-20].

Johnson knew that some Muslim women wear head scarves because he had seen them on television. [*Id.*, 47:23-25]. Viewing photographs of Elauf, he stated that she would have been a good candidate to hire as a model except for the head scarf. [*Id.*, 70:15-18].

Johnson could not recall if he asked Cooke whether Elauf could remove her head scarf. [*Id.*, 50:13-18]. He did not recall any discussion about how Elauf could comply with the Look Policy if hired. [*Id.*, 51:20-23].

During her interview of Elauf, Cooke had filled out a Model Group Interview Guide rating sheet, rating Elauf on three "competencies" required for the job of model: "outgoing and promotes diversity," "sophistication and aspiration," and "appearance and sense of style." [Dkt. # 68, Ex. 4, Cooke Dep., 104:10-105:7]. A candidate who scores below a total combined score of 6 is classified as "below expectations" and not recommended for hiring. [# 68, Ex. 4, Cooke Ep., Ex. 5 thereto at A & F001997].

Originally, Cooke gave Elauf a "2" (on a scale of 1-3, with 3 being the highest) in all three competencies. [*Id.*, 104:15-105:23]. She also originally marked the "hiring recommendation" as "recommend." [*Id.*, 106:17-23]. She testified that when Johnson told her not to hire Elauf, "he told me to give her a 1 on appearance, so then her

score would be a 5 instead of a 6, and I would not hire her." [*Id.*, 122:13-25]. After Cooke consulted Johnson, she threw away Elauf's original rating sheet and filled out a new one, changing Elauf's score on "Appearance and Sense of Style" from 2 to 1. [*Id.*, 123:1-19]. After she changed the rating, Cooke did not extend a job offer to Elauf. [# 68, Plaintiff's Statement of Facts ¶ 22].

Elauf testified that, at the end of her interview, Cooke told her she would call her the next day or the day after and let her know when orientation was. [Dkt. # 68, Ex. 2, Elauf Dep., 66:1-5]. Elauf never got a call, and her friend Farisa told her three days after the interview that the district manager had told Cooke not to hire her because of the head scarf. [*Id.*, Ex. 2, Elauf Dep., 66:13-67:13].

Look Policy Exceptions

Requests for exceptions to the Look Policy must be approved by Abercrombie's Human Resources Department in corporate headquarters. [# 68, Ex. 7, Riley Dep., 109:5-110:19]. Riley testified that exceptions to the Look Policy are recorded in the Human Resources contact records database, but Abercrombie has not tracked the exceptions or measured whether they have had any negative impact on how customers view the Abercrombie style. [*Id.*, 129:4-24].

In 2006, Abercrombie's Human Resources Department approved a head scarf exception to the Look Policy. [Dkt. # 68, Ex. 7, unnumbered exhibit thereto, Contact Records, A & F004313]. Additionally, since 2006, the department has approved the following exemptions to the Look Policy: allowing males to work with facial hair for religious and medical reasons;

allowing females to wear bracelets for religious reasons; allowing female employees to wear long skirts inconsistent with skirts sold in the stores for religious reasons; and allowing males to wear yarmulkes for religious reasons. [# 68, Plaintiff's Statement of Facts ¶ 35, Ex. 3, Moorefield Dep. 262:22-264:4; Ex. 13, HR Contact Records; Ex. 14, Defendant's Supp. Resp. To Pl.'s First Request for Admissions, Nos. 15 and 16; Ex. 7, Riley Dep., 92:17-93:11; 101:20-23; 139:12-140:13; 158:6-138:3, Riley Dep. Exs. 25-26].

Subsequent to its rejection of Elauf's application, Abercrombie began to allow more head scarf exceptions. [# 68, Ex. 7, Riley Dep., 92: 17:24; 236:1-6]. In an interview reported by the New York Times (online) on September 23, 2010, Abercrombie's General Counsel Ronald A. Robins, Jr., said that Abercrombie "makes every reasonable attempt to accommodate the religious practices of associates and applicants, including, where appropriate, allowing associates to wear a hijab." [*Id.*, Ex. 15, N.Y. Times.com article; Ex. 12, Defendant's Response to Requests for Admission §§ 1-2]. Abercrombie's Vice President of Human Resources, Deon Riley, testified Abercrombie now allows exceptions to the policy against headwear and, with respect to the head scarf, has allowed eight or nine exceptions. [# 68, Ex. 7, Riley Dep., 236:1-6].

Abercrombie executives uniformly testified that allowing exceptions to the Look Policy has a negative impact on the brand and on sales. Riley testified she believes the Look Policy leads to a better in-store experience and more repeat customers and the in-store experience "is a core driver of our business." [# 50, Ex. C., Riley Dep., 31:13-32:]. However, she also admitted that the report of Dr. Erich A. Joachimsthaler,

Abercrombie's expert in this case, is the only study or analysis Abercrombie has conducted in the last two years on the effect of a Look Policy exemption, and Riley's department has not been asked to assess whether or how deviations impact customer views or to review sales for that purpose. [Dkt. # 68, Ex. 7, Riley Dep., 13:9-16:4; Ex. 8, Def. Supp. Answers to Pl. First Interrogatories, No. 5].

A store's compliance with the Look Policy is tracked by the Director of Stores and the Regional Managers through ratings on store audits and in Secret Shopper reports. [# 68, Plaintiff's Statement of Facts ¶ 28, Ex. 3, Chad Moorefield Dep., 170:2-173:15]. Chad Moorefield, Director of Stores for Abercrombie, testified that he never did any empirical analysis to determine if a drop in store audit scores is correlated to a drop in sales for any store [*Id.*, 195:1-199:20], although he has "seen stores or managers that do a poor job of enforcing our Look Policy and ha[s] seen low sales scores because of it." [*Id.*, 218:1-9].

Human Resources Director Amy Yoakum testified she believes that granting an exception for Elauf would have created an undue burden because it could negatively affect the "store experience" for Abercrombie's customers and the uniform enforcement of the Look Policy. [Dkt. # 68, Ex. 11, Yoakum Dep. 62:16-63:23; 68:16-69:2]. In her deposition on March 18, 2011, she was not aware that Abercrombie had, since the Elauf incident, granted eight or nine exceptions for head scarves, but stated that knowledge would not change her opinion. [*Id.*, 65:2-10]. Yoakum was not aware of any study to measure the impact of Look Policy deviations. [*Id.*, 68:8-15].

Abercrombie's expert, Lundquist, testified that she created the job description for the model position that was in effect in 2008. [# 50, Ex. G., Kathleen K. Lundquist Decl., ¶ 7]. She stated that an essential function of the job as an Abercrombie model is to "act as a model for the brand," and in so doing "represent the [Abercrombie] brands in their appearance and sense of style." [*Id.*, ¶ 8]. She opined that "it is both critical to the job and an essential function of the job of Model at Abercrombie to maintain an appearance and sense of style consistent with the brand" and "critical to comply with standards of conduct including the Look Policy." [*Id.*, ¶ 23]. Lundquist has not performed any study or read any report regarding the impact of any store not being in compliance with the Look Policy and/or its impact on the brand. [Dkt. # 68, Ex. 10, Kathleen Lundquist Dep., 135:10-18].

Abercrombie relies on the Joachimsthaler report in support of its position that an exception would create an undue burden. [*Id.*, Ex. 8, Def. Supp. Answers to Pl. First Interrogatories, No. 5]. Abercrombie has not assigned a specific financial value to the alleged undue burden. [*Id.*].

Joachimsthaler testified regarding marketing strategy and brands. [Dkt. # 50, Ex. F., Joachimsthaler Written Testimony; Dkt. # 68, Ex. 9, Erich Joachimsthaler Dep.]. The declaration and deposition of Joachimsthaler establish:

- Abercrombie does not use television advertising and uses only minimal print advertising, and that its "brand identity" is communicated through the "in-store brand experience," including interactions

with employees. [Dkt. # 50, Ex. F. Joachimsthaler Dec., ¶ 11(ii)].

• Abercrombie's Look Policy plays a critical role in "communicating the overall brand experience and desired brand image to consumers" because "it ensures consistent and positive portrayals of the Abercrombie brand in the important in-store environment." [*Id.*, ¶ 11(iii)].

• "An employee's look or dress that is contrary to the guidelines of the Look Policy is identity distorting and would appear visibly 'off-brand' to the Abercrombie target, and negatively impact Abercrombie's ability to communicate a consistent 'on brand' experience to its target customers," and "[t]here is potential to cause consumer confusion and decrease brand preference and value perceptions for the Abercrombie brand," including "a decreased ability to effectively market to its target and establish strong emotional bonds with them; a decreased ability to retain exiting customer; and increased costs of marketing and merchandising its products successfully." [*Id.*, ¶ 11(iv)].

• Joachimsthaler was aware that Abercrombie's Human Resources Department has approved exceptions to the Look Policy for head scarves. He knows of no studies done by Abercrombie to determine if allowing employees to wear headscarves has resulted in lost sales. He has not done such a study himself. [# 168, Ex. 9, Joachimsthaler Dep., 187:8-22].

• When asked to "square" his opinion that allowing models to wear head scarves could cause a negative impact on the brand with the fact that

Abercrombie now allows exceptions to the policy to permit wearing of the head scarf, Joachimsthaler opined that the exceptions "still negatively impact the brand." [*Id.*, 147:22-24].

II. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden to show that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

The non-moving party must set forth facts sufficient to establish the existence of a genuine issue for trial. *Rocky Mountain Rogues, Inc. v. Town of Alpine*, 375 Fed. Appx. 887, 891 (10th Cir. 2010). Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The mere existence of "a scintilla of evidence" in support of the non-moving party's position is insufficient. *Id.* To survive a motion for summary judgment, the non-moving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S. Ct. 2548.

The court must "view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury." *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1402 (10th Cir. 1997) (quoting *Williams v. Rice*, 983 F.2d 177, 179 (10th Cir. 1993)).

III. Analysis

Title VII makes it "an unlawful employment practice for an employer to discharge any individual, or otherwise discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's religion." 42 U.S.C. § 2000e-2(a)(1). "Religion" is defined to include only those "aspects of religious observance and practice" that an employer is able to "reasonably accommodate without undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). Title VII imposes an obligation on the employer "to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business." 29 C.F.R. § 1605.2(b)(1), (2).

On summary judgment, the principles outlined above are applied using the burden-shifting approach set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, the plaintiff initially bears the burden of production with respect to a prima facie case by showing that (1) she had a bona fide religious belief that conflicts with an employment requirement; (2) she informed the employer of this belief; and (3) she was not

hired for failing to comply with the employment requirement. *Thomas v. National Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000). The burden then shifts to the defendant, who must: "(1) conclusively rebut one or more elements of the plaintiff's prima facie case, (2) show that it offered a reasonable accommodation, or (3) show that it was unable to accommodate the employee's religious needs reasonably without undue hardship." *Id.* at 1156 (emphasis added).[5]

A. Prima Facie Case

The EEOC introduced evidence that Elauf wears a head scarf based on her belief that the Quran requires her to do so, and that this belief conflicts with Abercrombie's prohibition against headwear;[6] that Abercrombie had notice she wore a head scarf because of her religious belief; and that it refused to hire her

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[5] The court in *Thomas* explained that the burden shifting approach is different in ADA and religious discrimination cases than in other types of discrimination cases:

> In [an ADA or religious failure to accommodate] case, the Congress has already determined that a failure to offer a reasonable accommodation to an otherwise qualified disabled employee *is* unlawful discrimination. Thus, we use the burden-shifting mechanism, not to probe the subjective intent of the employer, but rather simply to provide a useful structure by which the district court, when considering a motion for summary judgment, can determine whether the various parties have advanced sufficient evidence to meet their respective traditional burdens to prove or disprove the reasonableness of the accommodations offered or not offered.

225 F.3d at 1155.

[6] The Look Policy prohibits the wearing of "caps" on the sales floor.

because the head scarf conflicted with its Look Policy. Thus, plaintiff has established a prima facie case.

B. Rebuttal of Prima Facie Case

Abercrombie challenges two elements of the prima facie case, asserting Elauf's wearing of the head scarf is not based on a bona fide religious belief and the notice requirement was not satisfied.

1. Bona Fide Religious Belief

A "bona fide religious belief" is one that (1) is religious within the plaintiff's own scheme of things, and (2) is sincerely held. *United States v. Seeger*, 380 U.S. 163, 185, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965). As long as a party's beliefs are religiously based, it is not for the courts to inquire whether those beliefs "derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144 n.9, 107 S. Ct. 1046, 94 L. Ed. 2d 190 (1987). Thus, the individual's assertion "that [her] belief is an essential part of a religious faith must be given great weight." *Seeger*, 380 U.S. at 184, 85 S. Ct. 850. Courts may not engage in an extensive inquiry into the religious beliefs of the plaintiff in order to determine whether religion mandates the employee's adherence. *See Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993), citing *Fowler v. State of R.I.*, 345 U.S. 67, 73 S. Ct. 526, 97 L. Ed. 828 (1953). The Supreme Court has stated, "[I]t is no business of courts to say what is a religious practice or activity." *Fowler v. Rhode Island*, 345 U.S. 67, 70, 73 S. Ct. 526, 97 L. Ed. 828 (1953).

a. Whether Elauf Wears a Scarf Based on a Religious Belief

Citing testimony of an expert witness for the EEOC, John Esposito, Abercrombie suggests Elauf wears a head scarf for cultural reasons rather than because of a religious belief.[7] Elauf, though, testified that she considers the head scarf to be a representation and reminder of her faith, a religious symbol, a symbol of Islam and of modesty. Indeed, the record is devoid of evidence that *her* decision to don a head scarf at age 13 and continue to wear it to this time is based on anything *other* than her religious belief.

Abercrombie also asserts that since the Quran does not explicitly state that women must wear head scarves, Elauf's belief is not a religious belief. However, the broad definition of "religion" does not require that a belief have a textual basis. In *Redmond v. GAF Corporation*, 574 F.2d 897, 900 (7th Cir. 1978), the court held that the protection of Title VII is not limited to situations involving "a practice specifically mandated or prohibited by a tenet of the plaintiff's religion." The court explained:

> First, we note that the very words of the statute ("all aspects of religious observance and practice ") leave little room for such a limited interpretation. Secondly, we note that to restrict the act to those practices which are mandated or prohibited by a tenet of the religion, would involve the court in determining not only what are the tenets

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[7] Esposito an expert on Islam and the Muslim faith, testified generally that head scarfs can be worn for many different reasons. including cultural, religious or nationalistic reasons. [Dkt. # 86, Ex. 8, John Esposito Dep., 41:9-21, 53:4-8]

> of a particular religion, which by itself perhaps would not be beyond the province of the court, but would frequently require the courts to decide whether a particular practice is or is not required by the tenets of the religion. We find such a judicial determination to be irreconcilable with the warning issued by the Supreme Court in *Fowler v. Rhode Island*, 345 U.S. 67, 70, 73 S. Ct. 526, 527, 97 L. Ed. 828 (1953), "(I)t is no business of courts to say what is a religious practice or activity."

Id.

Here, Elauf acknowledged that the Quran does not directly command women to wear head scarves, that some of her friends and family members do not do so, and that she does not consider them to be bad Muslims. However, based upon the Quran's teaching that women must display modesty, Elauf believes *she* should wear a head scarf, and she has done so since puberty at age 13. Heeding the cautionary language of *Fowler*, the court finds that Elauf wears a head scarf based on her religious belief.

b. Whether Elauf's Belief is Sincerely Held

Abercrombie also challenges the sincerity of Elauf's religious belief because she did not know the street address of her mosque, does not regularly attend Friday services, and does not pray five times a day or every day.

As the Second Circuit Court of Appeals has observed, "[I]t is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's reli-

gious beliefs in the Title VII context." *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2nd Cir. 1985). "[T]he sincerity of [a claimant's] religious beliefs is relevant to *whether or not the observance or practice for which an accommodation was requested* will be considered 'religious' in nature." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997) (emphasis added).

The court in *Philbrook* stated, "[A] sincerity analysis is necessary in order to differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Id.* at 482. The court further instructed:

> In *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (citations omitted), we outlined several factors that indicated insincerity, noting that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." The *Barber* court also stated that "the religion's size and history" is relevant to the sincerity determination. *Id.* The burden on plaintiff, however, is not a heavy one. We must avoid any test that might turn on "the fact-finder's own idea of what a religion should resemble" L. Tribe, *supra*, at 861.

Id.

Citing *EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto*

Rico, 279 F.3d 49 (1st Cir. 2002),[8] Abercrombie argues the issue of Elauf's sincerity is one of credibility and therefore must be submitted to a jury. The court agrees that the sincerity of a Title VII claimant's religious belief goes to credibility. However, as stated in *Ilona*, *supra*, this court's focus must be on the sincerity of Elauf's belief that she must wear a head scarf-not whether she observed all tenets of the Muslim faith-because it was her belief about head scarves that required accommodation. And the *purpose* of the inquiry, according to *Philbrook*, *supra*, is whether this belief is held as a matter of conscience or instead, animated by motives of deception and fraud.

The record is devoid of *any* evidence Elauf's belief is animated by motives of deception and fraud. To the contrary, the type of inquiry suggested in *Philbrook* shows that Elauf has, since age 13, worn the head scarf consistently and continuously when in public or in the presence of men who are strangers—this despite the fact that she resides in Tulsa, Oklahoma, and is a fashion conscious young woman. There is no evidence Elauf has sought or received financial gain by wearing the head scarf. Finally, the Muslim practice of wearing a head scarf is neither new nor uncommon.

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[8] In *Union Independiente*, the EEOC brought an action on behalf of a member of the Seventh-Day Adventist Church who claimed "the tenets of his religion" prohibited him from joining a labor organization. 279 F.3d at 51. The appellate court found the district court erred because the union had presented evidence of "conduct on [claimant's] part that is contrary to the tents of his professed religious belief." *Id.* at 56. In this case, the religious belief is much more narrowly framed because the *sole* belief asserted is Elauf's belief that she must wear a head scarf.

There being no genuine dispute that Elauf wears a head scarf because of a bona fide religious belief, the court finds Abercrombie has not rebutted this element of plaintiff's prima facie case.

2. Notice

Citing *Thomas*, Abercrombie argues that since Elauf did not tell the interviewer she had a religious belief that conflicted with the Look Policy and that she needed an accommodation, the notice element of the prima facie case has not been satisfied.[9] The EEOC urges a less restrictive approach, asserting that although Abercrombie is required to have had notice that Elauf needed an accommodation, the notice need not have been strictly in the form of Elauf verbally requesting such an accommodation.

Courts in other circuits have held that the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job. *See Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Brown v. Polk County, Iowa*, 61 F.3d 650, 654 (8th Cir. 1995) ("It would be hyper-technical to require notice of the Plaintiff's religious beliefs to come only from the Plaintiff"); *Heller*, 8 F.3d at 1439 (9th Cir. 1993); *Hellinger v. Eckerd Corp.*, 67 F Supp. 2d 1359, 1361 (S.D. Fla.1999).

While the Tenth Circuit has not addressed the question of whether notice must be explicitly request-

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[9] In *Thomas*, it was undisputed that plaintiff, a postal employee, had explicitly requested five religious accommodations. *Id.* at 1156. Thus, the adequacy of notice was not at issue.

ed by the employee, the court in *Thomas* discussed at some length the reason notice was essential to the interactive process of accommodation:

> This statutory and regulatory framework, like the statutory and regulatory of the Americans with Disabilities Act (ADA), involves an interactive process that requires participation by both the employer and the employee. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69, 107 S. Ct. 367, 93 L. Ed. 2d 305 [(1986)] (stating that, consistent with the goals expressed in the legislative history of the religious accommodation provision, "Courts have noted that bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and the exigencies of the employer's business") (internal quotations and citations omitted); *Smith v. Pyro Mining Co.*, 827 F.2d 1081, 1085 (6th Cir. 1987) ("Although the burden is on the employer to accommodate the employee's religious needs, the employee must make some effort to cooperative with an employer's attempt at accommodation."); *cf. Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1171-72 (10th Cir. 1999) (en banc) (discussing the interactive process between an employer and an employee under the ADA).

Id. at 1155.

In *Smith v. Midland Brake, Inc.*, the Tenth Circuit stated:

> In general, the interactive process must ordinarily begin with the employee providing notice to the employer of the employee's disability and resulting limitations, and expressing a desire for reassign-

> ment if no reasonable accommodation is possible in the employee's existing job.

180 F.3d at 1171-72. In a footnote, the court, citing *Beck v. University of Wisconsin*, 75 F.3d 1130, 1134 (7th Cir. 1996), stated:

> An employee has the initial duty to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations-a duty dictated by common sense *lest a disabled employee keep his disability a secret and sue later for failure to accommodate.*

Id., n. 9 (emphasis added).

These cases teach that the purpose of the notice requirement is to facilitate the interactive process and prevent ambush of an unwitting employer. Thus, faced with the issue of whether the employee must explicitly request an accommodation or whether it is enough that the employer has notice an accommodation is needed—the Tenth Circuit would likely opt for the latter choice.

In this case, it is undisputed that Elauf wore her head scarf at the interview with assistant store manager Heather Cooke, and Cooke knew she wore the head scarf based on her religious belief. Because Cooke was uncertain whether Elauf would need an accommodation, she consulted the District Manager.[10]

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[10] Abercrombie argues an issue of fact exists as to whether Cooke told the District Manager, Randall Johnson, that Elauf wore a head scarf for religious reasons. This is not, however, a material fact issue, because the knowledge of Cooke—who had responsibility for hiring decisions at the Abercrombie Kids store—is attributable to Abercrombie.

Thus, Abercrombie has failed to rebut the second element of the prima facie case—that the employer had notice that Elauf wore a head scarf based on her religious belief.[11]

C. Undue Hardship

Abercrombie asserts that even if it has not rebutted the prima facie case, allowing Elauf to wear a head scarf would result in "undue hardship."

An employer must prevail as a matter of law if the employer cannot reasonably accommodate the employee's religious beliefs without "undue hardship on the conduct of the employer's business." *Lee v. ABF Freight Sys.*, 22 F.3d 1019, 1022 (10th Cir. 1994). An accommodation which results in "more than a *de minimus* cost" is an undue hardship to the employer and the employer need not provide the accommodation. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113 (1977).

Several Abercrombie executives have testified they believe granting Elauf an exception to the Look Policy would negatively impact the brand, sales and compliance. However, none have conducted any studies or cite specific examples to support this opinion. Instead, Abercrombie relies on Joachimsthaler's expert opinion.

Joachimsthaler, in turn, testified extensively about the importance of the in-store experience to Aber-

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[11] Under the uncontested facts in this case, there could be no bilateral, interactive process of accommodation because, although Abercrombie was on notice that Elauf wore a head scarf for religious reasons, it denied Elauf's application for employment without informing her she was not being hired or telling her why.

crombie's marketing strategy, and opined that the granting of even one exception to the Look Policy would negatively impact the brand. He has made no effort, however, to collect or analyze data to corroborate his opinion. If Abercrombie had never granted exceptions, or perhaps even if it had never granted exceptions for head scarfs, this omission might be understandable. Eight or nine head scarf exceptions, though, *have* been made, and the expert has completely failed to consider the impact, if any, of those exceptions.

The Tenth Circuit has stated:

> An accommodation that requires an employer to bear more than a "de minimis" burden imposes undue hardship. Any proffered hardship, however, must be actual; [a]n employer cannot rely merely on speculation. A claim of undue hardship cannot be supported by merely conceivable or hypothetical hardship The *magnitude* as well as the *fact* of hardship must be determined by examination of the facts of each case.

Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1492 (10th Cir. 1989). In light of the fact that Abercrombie has granted numerous exceptions to the Look Policy since 2001, and in particular has recently granted eight or nine head scarf exceptions, Joachimsthaler's opinion is too speculative to establish actual hardship, as required by *Toledo*.

Abercrombie has failed to meet its burden of establishing that granting Elauf an exception to the Look Policy would have caused undue hardship.[12]

IV. Conclusion

There being no genuine dispute as to any material fact, Abercrombie's Motion for Summary Judgment [Dkt. # 50] is denied and the EEOC's Amended Motion for Partial Summary Judgment [Dkt. # 68] as to liability is granted.

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[12] Abercrombie may be able to show undue hardship in other hijab cases, but it has not done so here.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-5110

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

ABERCROMBIE & FITCH, AN OHIO
CORPORATION, D/B/A ABERCROMBIE KIDS,
DEFENDANT-APPELLANT

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION,
ET AL., MOVANTS

[Filed: Feb. 26, 2014]

ORDER

Before: BRISCOE, Chief Judge, KELLY, LUCERO, HARTZ, TYMKOVICH, GORSUCH, HOLMES, MATHESON, BACHARACH and PHILLIPS, Circuit Judges.

This matter is before the court on appellee's *Petition for Rehearing En Banc*. We also have a response from the appellant. In addition, before us are two proposed amicus curiae briefs from the National Em-

ployment Lawyers' Association and the General Conference of Seventh-Day Adventists, et al. As an initial matter, we grant the request of the proposed amicus parties to file briefs on rehearing. *See* 10th Cir. R. 29.1.

The implicit request for panel rehearing found in the appellee's petition is denied by a majority of the panel which heard this case originally. Judge David Ebel would grant panel rehearing.

The petition was also transmitted to all of the judges of the court who are in regular active service. A poll was requested and the active judges split evenly on whether to grant the en banc request. Accordingly, the petition for en banc consideration is denied. *See* Fed. R. App. P. 35(a) (noting a majority of the active judges may order en banc rehearing). Chief Judge Briscoe, as well as Judges Lucero, Matheson, Bacharach and Phillips voted to grant en banc rehearing. Judge Hartz has written separately.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER
Clerk of Court

No. 11-5110, *EEOC v. Abercrombie & Fitch*

HARTZ, J., writing separately.

The question before the court is whether to review en banc the panel's determination that the EEOC did not present a prima facie case. Although I vote to deny en banc review, I believe the panel (bound by circuit precedent) did make a fundamental error. In the posture of this case (after Abercrombie & Fitch presented its evidence that it should prevail even if the EEOC had presented a prima facie case), it is irrelevant whether the EEOC presented a prima facie case. *See U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983). Although *Aikens* concerned review after trial, I see no reason why its analysis would not apply equally to review of a summary judgment. *See Wells v. Colo. Dep't of Transp.*, 325 F.3d 1205, 1226-28 (10th Cir. 2003) (Hartz, J. , concurring); *see also* Timothy M. Tymkovich, *The Problem With Pretext*, 85 Denv. U. L. Rev. 503 (2008).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-5110
(D.C. No. 4:09-CV-00602-GKF-FHM)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF-APPELLEE

v.

ABERCROMBIE & FITCH STORES, INC., AN OHIO CORPORATION, D/B/A ABERCROMBIE KIDS,
DEFENDANT-APPELLANT

[Filed: Oct. 1, 2013]

JUDGMENT

Before: **KELLY**, **EBEL**, and **HOLMES**, Circuit Judges.

This case originated in the Northern District of Oklahoma and was argued by counsel.

The judgment of that court is reversed. The case is remanded to the United States District Court for the Northern District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court

/s/ ELISABETH A. SHUMAKER
ELISABETH A. SHUMAKER, Clerk

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

1. 42 U.S.C. 2000e provides in pertinent part:

Definitions

For the purpose of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

* * * * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

* * * * *

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

* * * * *

2. 42 U.S.C. 2000e-2 provides in pertinent part:

Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

3. 29 C.F.R. 1605.1 provides:

"Religious" nature of a practice or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This

standard was developed in *United States* v. *Seeger*, 380 U.S. 163 (1965) and *Welsh* v. *United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[1] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee. The phrase "religious practice" as used in these Guidelines includes both religious observances and practices, as stated in section 701(j), 42 U.S.C. 2000e(j).

4. 29 C.F.R. 1605.2 provides in pertinent part:

Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.

(a) *Purpose of this section.* This section clarifies the obligation imposed by title VII of the Civil Rights Act of 1964, as amended, (section 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. Thi section does not address other obligations under title VII not to discriminate on grounds of religion, nor other provisions of title VII. This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutional, or other statutory provisions; neither is it intended to provide guidance for statutes which require accommo-

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[1] See CD 76-104 (1976), CCH ¶ 6500; CD 71-2620 (1971), CCH ¶ 6283; CD 71-779 (1970), CCH ¶ 6180.

dation on bases other than religion such as section 503 of the Rehabilitation Act of 1973. The legal principles which have been developed with respect to discrimination prohibited by title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to accommodate.* (1) Section 701(j) makes it an unlawful employment practice under section 703(a)(1) for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[2]

* * * * *

(c) *Reasonable accommodation.* (1) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

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[2] *See Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

(d) *Alternatives for accommodating religious practices.* (1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations should consider as part of the obligation to accommodate and which the Commission will consider in investigating a charge. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also

employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in appendix A to §§ 1605.2 and 1605.3. The principles expressed in these Guidelines apply as well to such requests for accommodation.

(i) Voluntary Substitutes and "Swaps".

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) Flexible Scheduling.

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations

should consider is the creation of a flexible work schedule for individuals requesting accommodation.

The following list is an example of areas in which flexibility might be introduced: flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[3]

(iii) Lateral Transfer and Change of Job Assignments.

When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations should consider whether or not it is possible to change the job assignment or give the employee a lateral transfer.

(2) Payment of Dues to a Labor Organization.

Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices to not permit compliance with such a provision, the labor organization should accommodate the employee by not requiring the employee to join the organization and by permitting him or her to donate a sum equivalent to dues to a charitable organization.

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[3] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Pub. L. 95-390, 5 U.S.C. 5550a "Compensatory Time Off for Religious Observances."

(e) *Undue hardship.* (1) Cost. An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require "more than a *de minimis* cost" [4] The Commission will determine what constitutes "more than a *de minimis* cost" with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the Commission will presume that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. Further, the Commission will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a *de minimis* cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) Seniority Rights. Undue hardship would also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny

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[4] *Hardison, supra*, 432 U.S. at 84.

another employee his or her job or shift preference guaranteed by that system. *Hardison, supra*, 432 U.S. at 80. Arrangements for voluntary substitutes and swaps (see paragraph (d)(1)(i) of this section) do not constitute and undue hardship to the extent the arrangements do not violate a bona fide seniority system. Nothing in the Statute or these Guidelines precludes an employer an a union from including arrangements for voluntary substitutes and swaps as part of a collective bargaining agreement.

5. 29 C.F.R. 1605.3 provides:

Selection practices

(a) *Scheduling of tests or other selection procedures.* When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(b) *Inquiries which determine an applicant's availability to work during an employer's scheduled working hours.* (1) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

(2) As a result of the oral and written testimony submitted at the Commission's Hearings on Religious Discrimination, discussions with representatives of organizations interested in the issue of religious discrimination, and the comments received from the public on these Guidelines as proposed, the Commission has concluded that the use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on the employment opportunities of persons with certain religious practices. The use of such inquiries will, therefore, be considered to violate title VII unless the employer can show that it:

(i) Did not have an exclusionary effect on its employees or prospective employees needing an accommodation for the same religious practices; or

(ii) Was otherwise justified by business necessity.

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest and which would have a lesser exclusionary effect on persons whose religious practices need accommodation. An example of such a procedure is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation

is possible. This type of inquiry would provide an employer with information concerning the availability of most of its applicants, while deferring until after a position is offered the identification of the usually small number of applicants who require an accommodation.

(3) The Commission will infer that the need for an accommodation discriminatorily influenced a decision to reject an applicant when: (i) prior to an offer of employment the employer makes an inquiry into an applicant's availability without having a business necessity justification; and (ii) after the employer has determined the applicant's need for an accommodation, the employer rejects a qualified applicant. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.